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No.

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1987

TYLER PIPE INDUSTRIES, INC.
Appellant

VS.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee

On Appeal from the Supreme Court of Washington

JURISDICTIONAL STATEMENT

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April 4, 1988

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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

This appeal concerns the denial of remedy to Appellant by the Washington Supreme Court on remand of *Tyler Pipe Industries, Inc. v. State of Washington Department of Revenue,* U.S. , 107 S.Ct. 2810 (1987).

On June 23, 1987, this Court held in *Tyler Pipe* that the Washington Business and Occupation Tax ("B&O Tax") violated the Commerce Clause of the United States Constitution because it discriminated against interstate commerce. This Court remanded the case to the Washington Supreme Court to address in the first instance remedial issues that might be affected by questions of state law. 107 S.Ct. at 2822-3. The Washington Supreme Court held that Tyler, who successfully litigated the unconstitutionality of the tax, should receive nothing for its efforts. In denying a remedy, the decision of the Washington Supreme Court frustrates the judicial process and undermines the constitutional protections afforded United States citizens by removing any incentive for an out-of-state person to contest an unconstitutional state tax.

The remand was not made in order to deny Tylor a remedy, but to determine the appropriate remedy.

The questions presented are:

1. Can a state court frustrate a decision of this Court by applying the decision prospectively only to deny a remedy to the prevailing litigant, who spent over seven years contesting the unconstitutional state tax?

2. Will the purposes of the Commerce Clause and Due Process Clause be frustrated if an interstate business that undertakes the burden and expense of contesting a discriminatory tax is denied a refund of the unconstitutionally collected taxes?

3. Will the purpose of the Commerce Clause and Due Process Clause be frustrated if a state that refused to follow this Court's decisions in prior cases is permitted to profit from its unlawful activity by keeping unconstitutionally collected taxes?

4. Has the Washington Supreme Court denied Tyler's right to due process by denying Tyler a refund of unconstitutionally assessed taxes that were collected without a prior hearing and paid under protest?

LIST OF PARTIES

The names of all parties to the proceedings below are reflected in the caption of the case. Pursuant to Supreme Court Rule 28.1, the Appellant, Tyler Pipe Industries, Inc., a Delaware corporation with its principal office in Tyler, Texas, states that it is a wholly-owned subsidiary of Tyler Corporation. There are no other parent corporations, subsidiaries or affiliates of Appellant or Tyler Corporation other than wholly-owned subsidiaries of each.

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V. The Supreme Court of Washington has determined that there are no relevant state law considerations and that only federal law is determinative of the proper remedy. Because the Washington Supreme Court has misapplied federal law with adverse consequences affecting all persons engaged in interstate commerce or otherwise victimized by unconstitutional state action, this Court should decide the issue of remedy without the need for further remand 19

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Tyler Pipe Industries, Inc., the Appellant ("Tyler"), appeals from the final judgment of the Washington Supreme Court rendered in this case on January 28, 1988. This jurisdictional statement is submitted to show that the Court has jurisdiction and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Washington Supreme Court (Appendix B, infra, p. B-1) is reported at 109 Wash.2d 878, P.2d .

JURISDICTION

On February 25, 1981, Tyler petitioned the State of Washington Department of Revenue to correct an assessment of Washington B&O Taxes on the grounds that the imposition of the tax on Tyler violated the Due Process and Commerce Clauses of the United States Constitution. On May 20, 1981, after exhausting administrative remedies, Tyler brought this action in the Superior Court of Thurston County, Washington.

On March 6, 1986, the Supreme Court of Washington entered and filed its opinion and judgment against Tyler. On April 15, 1986, Tyler filed a notice of appeal in that court. By decision dated June 23, 1987, this Court overruled the Washington Supreme Court and remanded the case. On January 28, 1988, the Washington Supreme Court entered and filed its opinion on remand denying Tyler all relief. On March 10, 1988, Tyler filed a notice of appeal in that court.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). This appeal deals with the effects of this Court's striking down an unconstitutional State of Washington statute that had been upheld by the Washington Supreme Court.

Alternatively, the jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). See, 28 U.S.C. Section 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the United States Constitution, Article I, Section 8, clause 3; and of the United States Constitution, Amendment XIV, Section 1; and of Sections 82.04.220, 82.04.440 and 82.04.500 of the Revised Code of Washington, which were struck down by the Court, are set forth at Appendix E, infra.

STATEMENT OF THE CASE

1. *Proceedings Below: Federal Question Raised*

On December 26, 1980, the State of Washington Department of Revenue assessed business and occupation taxes (hereinafter referred to as "B&O Taxes") for the period January 1, 1976 through September 30, 1980 against Appellant, Tyler Pipe Industries, Inc. On February 25, 1981, Tyler petitioned the Department of Revenue for correction of the assessment on the grounds that imposition of the tax against Tyler violated the Due Process and Commerce Clauses of the United States Constitution. On March 20, 1981, the Department denied the petition. On April 30, 1981, the Department turned down Tyler's administrative appeal of the denial of its petition. On May 20, 1981, Tyler sought a temporary injunction in the Superior Court for Thurston County, Washington, against the Department's collection of the assessment. In its complaint, Tyler asserted that the assessment violated the Due Process and Commerce Clauses of the United States Constitution. On June 8, 1981, the Superior Court granted the injunction. On January 4, 1982, the Washington Supreme Court reversed the injunction on the grounds, *inter alia*, that Tyler had an adequate remedy at law in the form of a right to a refund of any illegally assessed and collected B&O Taxes.

On March 10, 1982, Tyler paid the tax assessment and sued for refund in the Superior Court for Thurston County, State of

Washington, on the grounds that assessment and collection of the tax violated the Due Process and Commerce Clauses of the United States Constitution. On June 15, 1984, the Superior Court filed a memorandum opinion holding that the B&O Tax did not violate the Due Process Clause. On June 12, 1984, this Court issued its opinion in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). On August 6, 1984, the Superior Court denied Tyler's motion for reconsideration on the grounds that *Armco* did not apply. On November 9, 1984, Tyler timely filed its Notice of Appeal to the Washington Supreme Court. On March 6, 1986, the Washington Supreme Court filed its opinion affirming the Superior Court in all respects. On April 15, 1986, Tyler timely filed its Notice of Appeal to the United States Supreme Court. On June 23, 1987, this Court held that the State of Washington's taxing scheme discriminated against interstate commerce and violated the Commerce Clause and the Due Process Clause of the United States Constitution.

The Court remanded the case to the Washington Supreme Court for that court to address in the first instance remedial issues that may be affected by questions of state law. On January 28, 1988, the Washington Supreme Court concluded that no state law was applicable, and went on to hold that this Court's decision in *Tyler Pipe* will be applied only prospectively in such a manner as to deny the successful plaintiff in that case, Tyler, any refund of the unlawfully collected taxes.

On March 10, 1988, Tyler timely filed its Notice of Appeal to the United States Supreme Court.

While these judicial proceedings were under way, the Department of Revenue for the State of Washington assessed additional B&O Taxes against Tyler for the period October 1, 1980 through September 30, 1987 in the total amount of $174,266.28, including $15,947.49 in penalties and interest. On December 21, 1987, Tyler filed suit in the Superior Court for Thurston County, State of

Washington, for refund of the assessed B&O Taxes for the periods from October, 1980 through March, 1987, and filed an administrative appeal with the Department of Revenue for the periods from April, 1987 through September, 1987, on the grounds that assessment and collection of the tax violated the Due Process and Commerce Clauses of the United States Constitution. The resolution of the contest of the tax assessments for these subsequent years had been held pending the resolution of this case.

By letter dated February 23, 1988, the Department of Revenue has denied Tyler's petition contesting on Due Process and Commerce Clause grounds the assessment of B&O Taxes for the periods from April, 1987 through September, 1987, and threatened to assert a 50% "evasion penalty" if the tax was not paid by March 24, 1988.

2. *Statement of Facts*

Tyler is a corporation established under the laws of the State of Delaware, qualified to do business in the State of Texas, and maintaining its principal place of business in Tyler, Texas. It is engaged in the business of selling pipe, plumbing, and related products.

The State of Washington imposed the Washington B&O Tax at the rate of 0.44% on gross receipts from the sale of products in the state. The Washington B&O Tax discriminated against interstate commerce.

The Court held the Washington B&O Taxing scheme to be unconstitutional, and remanded this case to the Washington Supreme Court to address in the first instance remedial issues that may be affected by questions of state law. The Washington Supreme Court concluded that state law did not require refunds of unconstitutional taxes, and that this Court's decision in *Tyler Pipe* will be applied only prospectively in such a manner as to deny the successful plaintiff in that case, Tyler, any refund of the unlawfully collected taxes.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Washington Supreme Court frustrates the judicial process by denying a successful litigant a remedy. The decision of the Washington Supreme Court, if allowed to stand, chills any enthusiasm for contesting unconstitutional state taxes and undermines the constitutional protections afforded United States citizens under the Commerce Clause and the Due Process Clause by removing any incentive for an out-of-state person to contest an unconstitutional state tax.

The Washington Supreme Court has held that the decision of this Court in *Tyler Pipe* should be applied prospectively only, and applied prospectively in such a manner as to deny any relief to Tyler, the successful plaintiff in that case. This Court has never sanctioned such a severe doctrine of prospective application that denies all relief to the successful plaintiff. The opinion of the Washington Supreme Court, if allowed to stand, will adversely impact interstate commerce because the Washington Supreme Court has established a new policy of law that eliminates any incentive for aggrieved citizens to incur the expense and burden of litigating unconstitutional state levies.

The Washington Supreme Court has, moreover, created a strong incentive for states to abuse the constitutional rights of out-of-state citizens by allowing the State of Washington to retain tax revenues it has assessed and collected in knowing violation of the United States Constitution.

In holding that Tyler shall be denied all relief, the Washington Supreme Court has blatantly ignored this Court's opinion in *Tyler Pipe.* Despite this Court's clear statement that its holding was foreshadowed in its previous decisions, the Washington Supreme Court says that this Court's opinion established a new principle of law that was not foreshadowed by earlier opinions. The State of Washington continued to impose and collect the Washington B&O tax when it knew that the tax violated the Commerce Clause and the Due Process Clause.

The actions of the Washington Supreme Court require plenary consideration by this Court.

I. The purposes of the Commerce Clause and the Due Process Clause will be frustrated if the State of Washington is permitted to keep the taxes it illegally collected from Appellant. Nobody will undertake the burden and expense of contesting the unconstitutionality of a state tax if he is going to be denied a refund of the illegally collected taxes.

The Washington Supreme Court has not cited, and Tyler is not aware of, any case in which a decision of this kind has been applied prospectively in such a manner as to deny any relief whatsoever to a litigant who has spent considerable time and money pursuing its claim—particularly when, as here, it is clear that, absent a specific order directed to the wrongdoer State of Washington, the wrongdoer had no intention of following the prior rulings of this Court and every intention of willfully continuing to violate the constitutional rights of non-residents.

Denying Tyler any recovery, the Washington Supreme Court has frustrated the judicial process and emasculated the constitutional protections afforded to citizens of the United States, because no person can justifiably undertake the expense and burdens of litigating a meritorious claim with no prospect for relief.

The Washington Supreme Court, in an obvious effort to justify the State of Washington's keeping the tax monies it collected in knowing violation of the United States Constitution and in defiance of this Court's prior decisions, argues that

> [T]axpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability.

App. at B-13. This is spurious, for while the Washington judiciary was denying past tax relief, the Washington legislature was cutting off any future tax relief. See, App. at B-12. Under the

combined Washington judicial and legislative efforts, Tyler has avoided neither past, present nor future taxes, yet the Washington Supreme Court temerariously asserts that Tyler nevertheless has an incentive to litigate unconstitutional Washington taxes!

The Washington Supreme Court demonstrates, App. at B-12, that the State of Washington may completely avoid the effect of any adverse decision by this Court by simply making cosmetic, non-substantive changes to its statutes (in this case, by enacting a credit for which no person could ever qualify, see Tyler Reply Br. at 15-16, App. at F-1 *), thereby offering its mythical taxpayer an opportunity to commence yet another generation of litigation, with the prospect of producing another "prospective" ruling. Who could justify the expenditure of time and money to contest the validity of that statute, knowing that any relief will only be "prospective" and illusory? Denial of a remedy to the prevailing litigant in a case such as this is denial of due process.

The vice created by the Washington Supreme Court is particularly offensive because the State of Washington has a history of aggressive taxation that has resulted in an exceptional string of litigation, which this most recent decision discourages.

Tyler has endured in a long battle against the unconstitutional Washington B & O tax statute, opposed at each step by one of the executive, legislative, or judicial branches of the Washington State government:

March 20, 1981	Tyler's petition for correction of the assessment of the unconstitutional taxes denied
April 30, 1981	Tyler's appeal of the denial of its petition turned down.

*A similar credit scheme is before this Court in *Goldberg v. Director of Illinois Department of Revenue*, No. 87-826 (02/22/88); and *GTE Sprint Communications Corp. v. Director of Illinois Department of Revenue*, No. 87-1101 (02/22/88).

June 8, 1981	Tyler obtains injunction against the collection of the unconstitutional tax.
January 4, 1982	Washington Supreme Court reverses the injunction.
June 12, 1984	*Armco, Inc. v. Hardesty* decided.
June 15, 1984	Superior Court holds against Tyler.
August 6, 1984	Tyler's Motion for Reconsideration in light of *Armco* denied.
April 30, 1985	Washington state legislature enacts illusory retroactive credit applicable only if this Court strikes down the B & O Tax.
March 6, 1986	Washington Supreme Court rules against Tyler.
June 23, 1987	This Court holds the Washington B & O Tax to be unconstitutional.
August 10, 1987	Washington state legislature enacts illusory retroactive and prospective credit in response to *Tyler Pipe*.
January 28, 1988	Washington Supreme Court denies Tyler any remedy.

The State of Washington has done everything possible to maintain its system of discriminating against non-resident, non-voting taxpayers, in complete indifference to their rights under the U. S. Constitution.

The purposes of the Commerce Clause and the Due Process Clause will be served only if Tyler is afforded a remedy. If states are not held accountable for their knowing violations of the United States Constitution, and if litigants who successfully defend their constitutional rights are denied relief, then interstate busi-

nesses are afforded no effective constitutional protections and are hostage to the fiscal greed of each state.**

II. To justify applying this Court's decision in *Tyler Pipe* prospectively only, the Washington Supreme Court asserted that this Court has established a new principle of law in *Tyler Pipe* that was not clearly foreshadowed in this Court's earlier opinions, and rejected this Court's express words in *Tyler Pipe* to the contrary.

A precondition to the prospective application of a decision of this Court is that the decision establish a new principle of law that was not clearly foreshadowed by earlier opinions. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). The Washington Supreme Court, in an effort to deny Tyler any remedy, held that "the *Tyler* decision established a new principle of law overruling past precedent," rejecting the opinion of this Court, which Justice Stevens commenced with the very words:

> In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), we held that West Virginia's gross receipts tax on the business of selling tangible property at wholesale discriminated against interstate commerce because it exempted local manufacturers.
>
> * * *
>
> We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here.

107 S.Ct. at 2812, App. at A-2. Justice Stevens was not proclaiming new and unforeshadowed principle of law.

The Washington Supreme Court pretends to rely upon this Court's earlier opinion in *General Motors Corp. v. Washington*,

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**The question of appropriate remedy before the Court in this case is a similar and recurring one. E.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Williams v. Vermont*, 472 U.S. 14 (1985); and *American Trucking Association, Inc. v. Conway*, Vt SuperCt, No. S-147-86WnC (02-11-88), which is currently working its way through the Vermont state court system. If the decision of the Washington Supreme Court is allowed to stand, interstate businesses will be adversely affected and interstate commerce impaired.

377 U.S. 436 (1964), see App. at B-5—B-6, even though *General Motors* did not deal with the issue of discrimination against interstate commerce. As Justice Stevens pointed out, this Court declined to reach the discrimination argument in *General Motors.* 107 S.Ct. at 2815, App. at A-5—A-6.

This Court stated:

> *General Motors* is not a controlling precedent. As we have already noted, the result in that case did not depend on the Court's resolution of whether the tax burdened interstate commerce.

107 S.Ct. at 2817, App. at A-10. This Court pointed out that, in *Armco,* it had "expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington,* [that the Washington B&O Tax unconstitutionally discriminated against interstate commerce]." 107 S.Ct. at 2816, App. at A-9.

> Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms appellee's efforts to limit the reasoning of *Armco* to the precise statutory structure at issue in that case. . . . Our holding in *Armco* requires that we now agree with Justice Goldberg's conclusion that the exemption before us is [unconstitutional].

107 S.Ct. at 2817, App. at A-10. The Washington Supreme Court's pretense that this Court's decision creates a new principle of law is a willful refusal to apply this Court's decision.

Justice Stevens also pointed to a number of much earlier decisions of this Court that led to its holding the Washington B&O Tax unconstitutional:

> *Freeman v. Hewit,* 329 U.S. 249 (1946), cited by this Court both in *Armco,* 467 U.S. at 642, and in *Tyler Pipe,* 107 S.Ct. at 2817 n. 11, App. at A-11; and

Maryland v. Louisiana, 451 U.S. 725 (1981), which was cited by Tyler in its briefs to the trial court below, as well as to the Washington Supreme Court, on this very issue, cited by this Court in *Tyler Pipe,* 107 S.Ct. at 2817 & 2818, App. at A-11 and A-12; and

Washington Dept. of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978) cited by this Court in *Tyler Pipe,* 107 S.Ct. at 2820, App. at A-15.

The result in *Tyler Pipe* was "clearly foreshadowed" in Justice Goldberg's dissent in *General Motors,* the only opinion of any Justice of this Court to deal directly with the issue of discrimination against interstate commerce in the situation presented in *Tyler Pipe,* involving the very same tax at issue in *Tyler Pipe.* See *Tyler Pipe,* 107 S.Ct. at 2816-17, App. at A-9—A-10.

The Court's decision and opinion in *Tyler Pipe* is required by this Court's long line of decisions prohibiting states from imposing taxing schemes that discriminate against interstate commerce. *Tyler Pipe* creates no "new principle of law" that the Washington Supreme Court may apply "prospectively" in order to deny citizens of the United States their rights and protections under the U. S. Constitution.

III. The State of Washington has long known that its B&O Tax was unconstitutional under the decisions of this Court, yet it has persisted in collecting that tax. The purposes of the Commerce Clause and the Due Process Clause will be frustrated if the State of Washington is permitted to retain the taxes it collected from a successful plaintiff in knowing violation of the U. S. Constitution.

The State of Washington was not surprised by this Court's decision in *Tyler Pipe.* It knew of the prior decisions of this Court foreshadowing the *Tyler Pipe* result. The State of Washington Department of Revenue was actively aware of those decisions. It participated in many of them:

June 8, 1964	Justice Goldberg's dissent in *General Motors*, a case in which the Department was a party.
April 26, 1978	*Washington Dept. of Revenue v. Association of Washington Stevedoring Cos.*, a case in which the Department was a party.
May 26, 1981	*Maryland v. Louisiana* decided.
early 1984	Washington Dept. of Revenue files *amicus* brief in *Armco* asserting that the Washington B&O Tax is "very similar" to the one at issue in *Armco*.
June 12, 1984	*Armco* decided.
June 14, 1984	Director of Dept of Revenue informs Governor that he believes the B&O Tax to be unconstitutional after *Armco*. See App. at B-8—B-9.
April 30, 1985	Washington state legislature enacts illusory retroactive credit applicable only if this Court strikes down the B&O Tax.
June 23, 1987	*Tyler Pipe* decided.

The State of Washington knew that the B&O Tax was unconstitutional, and was obstinate in continuing to apply it.

The Washington Supreme Court has simply ignored this Court's opinon in *Tyler Pipe*, because that opinion did not permit the Washington Supreme Court to reach the result it wanted.

IV. In denying Tyler a refund of the unconstitutionally collected tax, the Washington Supreme Court has subverted the purpose of the Commerce Clause and has denied the Due Process rights of Tyler under the Constitution. The purposes of the Commerce Clause and the Due Process Clause will be frustrated if the State of Washington is permitted to keep its illegally collected taxes when it is clear that the State had no intention of complying with this Court's decisions in *Armco* and prior cases.

The Washington Supreme Court has done what it can to protect its own. The Washington Supreme Court has denied Tyler, a non-resident, due process of law. After more than seven years of litigation and a decision from this Court holding the Washington B&O Tax unconsitutional, the Washington Supreme Court has denied Tyler any recovery of the taxes that the State of Washington illegally and unconstitutionally collected from Tyler.

The action of the Washington Supreme Court is especially egregious in light of its earlier denial of an injunction against the collection of the tax from Tyler on the grounds that Tyler had an adequate remedy at law in the form of a right to a refund. If no such remedy had been available, Tyler may have chosen to pursue alternative means of protecting its constitutional rights, perhaps by filing an appeal at that time to this Court. Instead, in reliance upon the promise of a remedy that is now denied Tyler, Tyler paid the unconstitutional tax and proceeded to litigate the issues in the State of Washington courts in the expectation that it would ultimately receive a refund.

Because the Washington Supreme Court is the highest court in the State of Washington, Tyler cannot obtain adequate relief in any court in the State of Washington. The Washington Supreme Court thus attempts to effectively overrule this Court.

Unless the Washington Supreme Court is compelled to follow the opinions and decisions of this Court, United States citizens will have no meaningful and effective right of appeal from unconstitutional actions of state governments and judiciaries.

V. The Supreme Court of Washington has determined that there are no relevent state law considerations and that only federal law is determinative of the proper remedy. Because the Washington Supreme Court has misapplied federal law with adverse consequences affecting all persons engaged in interstate commerce or otherwise victimized by unconstitutional state action, this Court should decide the issue of remedy without the need for further remand.

The Court stated in its opinion in *Tyler Pipe*,

> [T]he federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.
>
> * * *
>
> We are reluctant, therefore, to address them in the first instance.

107 S.Ct. at 2822, App. at A-21. Accordingly, this Court vacated the judgment of the Supreme Court of Washington and remanded this case to the Supreme Court of Washington for further proceedings not inconsistent with this Court's opinion. 107 S.Ct. at 2823, App. at A-22.

On remand, the Supreme Court of Washington cited no applicable state law "intertwined with" or "obviating the necessity to consider federal constitutional issues," but simply conceded, stating,

> Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional.

App. at B-3.

The Supreme Court of Washington ignored a retroactive credit enacted by the State Legislature in anticipation of this Court's decision in *Tyler Pipe* (see Appellee Br. at 46-47; and Tyler's Reply Br. at 15-16, App. at F-1), and the applicability of any

other State of Washington statute or law. The Washington Supreme Court recognized that the issue of the appropriate remedy in this case is *solely an issue of federal law*. App. at B-3. The Washington Supreme Court then purported to apply *federal* law.

In applying federal law, the Washington Supreme Court has grossly misconstrued and presumptuously attempted to overrule this Court's *Tyler Pipe* opinion in an effort to deny any relief to Tyler. Consequently, this Court should order a refund of the unconstitutional tax to Tyler.

VI. The Fourteenth Amendment of the United States Constitution requires the refund of an unlawful tax paid under protest and collected pursuant to a summary procedure without a prior hearing.

Due process requires that parties be entitled to a full and fair opportunity to be heard, and that such opportunity be granted in a meaningful time and in a meaningful manner. *Fuentes v. Chevin*, 407 U.S. 67, 80, 91 (1972). Where only property rights are involved, mere postponement of judicial inquiry does not amount to a denial of due process "*if* the opportunity given for ultimate judicial determination is adequate." *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 595–597 (1931) [emphasis added]. Here, no adequate opportunity has been afforded Tyler.

The availability of a remedy for a collected, but unconstitutional tax, is not optional under the Constitution. A state's ability to take property without a hearing is coextensive with, and requires its provision of, a remedy if the taxpayer later prevails on the merits. The State of Washington's failure to restore the tax payments that Tyler made after Tyler prevailed on the merits is tantamount to a taking without due process in the first instance.

Tyler's request for injunctive relief pending adjudication of its claims was denied, based in part upon the Washington Supreme

Court's identification of the availability of a refund as an adequate remedy at law. See *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). The Washington court's expedient, incorrect, and unprecedented use of prospective application to reconstitute its tax as "constitutional", thereby retroactively eliminating any remedy under Washington law, eviscerates the constitutional guarantees of due process.

CONCLUSION

Inasmuch as the Washington Supreme Court

(i) has laid down a general principle of law that will frustrate judicial review of unconstitutional state taxes,

(ii) has misinterpreted the *Tyler Pipe* decision as establishing a new principle of law,

(iii) exonerates the State of Washington's wilful collection of unconstitutional taxes,

(iv) denies Tyler a remedy it had earlier been promised,

(v) acknowledges that there are no state laws "obviating" or "intentional with" the constitutional issues, and

(vi) has denied a refund to Tyler required under the Fourteenth Amendment, Tyler prays:

1. That this Court order the State of Washington Department of Revenue to refund to Appellant Tyler Pipe Industries, Inc. all Washington Business and Occupation Taxes collected from Tyler with respect to the periods from and after January 1, 1976 through the date hereof.

2. That this Court order the State of Washington Department of Revenue to refrain and desist from all efforts to assess or collect from Appellant Tyler Pipe Industries, Inc. any Washington Business and Occupation Taxes with respect to the periods from and after January 1, 1976 through the date hereof.

3. That Appellant have such other or additional relief and process as this Court may determine to be necessary or appropriate.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

TYLER PIPE INDUSTRIES, INC. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 85-1963. Argued March 2, 1987—Decided June 23, 1987*

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and dissenting in part, in Part I of which REHNQUIST, C. J., joined. POWELL, J., took no part in the consideration or decision of the cases.

*Together with No. 85-2006, *National Can Corp. et al.* v. *Washington State Department of Revenue*, also on appeal from the court.

SUPREME COURT OF THE UNITED STATES

Nos. 85-1963 AND 85-2006

TYLER PIPE INDUSTRIES, INC., APPELLANT
85-1963

v.

WASHINGTON DEPARTMENT OF REVENUE

NATIONAL CAN CORPORATION, ET AL., APPELLANTS
85-2006

v.

WASHINGTON STATE DEPARTMENT OF REVENUE

ON APPEALS FROM THE SUPREME COURT OF WASHINGTON

[June 23, 1987]

JUSTICE STEVENS delivered the opinion of the Court.

In *Armco Inc.* v. *Hardesty,* 467 U. S. 638 (1984), we held that West Virginia's gross receipts tax on the business of selling tangible property at wholesale discriminated against interstate commerce because it exempted local manufacturers. The principal question in these consolidated appeals is whether Washington's manufacturing tax similarly violates the Commerce Clause of the Constitution because it is assessed only on those products manufactured within Washington that are sold to out-of-state purchasers. We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here.

I

For over half a century Washington has imposed a business and occupation (B & O) tax on "the act or privilege of engaging in business activities" in the State. Wash. Rev. Code § 82.04.220

(1985). The tax applies to the activities of extracting raw materials in the State,[1] manufacturing in the State,[2] making wholesale sales in the State,[3] and making retail sales in the State.[4] The State has typically applied the same tax rates to these different activities. The measure of the selling tax is the "gross proceeds of sales," and the measure of the manufacturing tax is the value of the manufactured products. §§ 82.04.220, 82.04.240.

Prior to 1950, the B & O tax contained a provision that exempted persons who were subject to either the extraction tax or the manufacturing tax from any liability for either the wholesale tax or the retail tax on products extracted or manufactured in the State.[5] Thus, the wholesale tax applied to out-of-state manufacturers but not to local manufacturers. In 1948 the Washington Supreme Court held that this wholesale tax exemption for local manufacturers discriminated against interstate commerce and therefore violated the Commerce Clause of the Federal Constitution. *Columbia Steel Co.* v. *State,* 80 Wash. 2d 658, 192 P. 2d 976 (1948). The State Supreme Court rejected the State's argument that the taxpayer had not suffered from discrimination against interstate commerce because it had

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[1]Wash. Rev. Code § 82.04.230 (1985).

[2]§ 84.04.240.

[3]§ 82.04.270.

[4]§ 82.04.250.

[5]The statute provided:

"Every person engaging in activities which are within the purview of the provisions of two or more paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4 [§ 8870–4], shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however, That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons.* (Italics supplied.)" See *Columbia Steel Co.* v. *State,* 30 Wash. 2d 658, 661, 192 P. 2d 976, 977–978 (1948).

not proved that it paid manufacturing tax to another State.[6] The Washington Supreme Court also dismissed the State's contention that if the State in which a good was manufactured did not impose a manufacturing tax, the seller of the good would have a competitive advantage over Washington manufacturers:

> "[T]he situation obtaining in another state is immaterial. We must interpret the statute as passed by the legislature. In our opinion the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in §8370–6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington." *Id.*, at 664, 192 P. 2d, at 979.

Two years later, in 1950, the Washington legislature responded to this ruling by turning the B & O tax exemption scheme inside out. The legislature removed the wholesale tax exemption for local manufacturers and replaced it with an exemption from the manufacturing tax for the portion of manufacturers' output that is subject to the wholesale tax.[7] The result, as before 1950, is that local manufacturers pay the manufacturing tax on their interstate sales and out-of-state manufacturers pay the wholesale tax on their sales in Washington. Local manufacturer-wholesalers

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[6]"The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce.' " *Id.*, at 663, 192 P. 2d, at 978 (quoting *Freeman* v. *Hewit*, 829 U. S. 249, 256 (1946)).

[7]The Washington Supreme Court upheld this revised scheme against constitutional challenge in *B. F. Goodrich Co.* v. *State*, 38 Wash. 2d 663, 231 P. 2d 825, cert. denied, 342 U. S. 876 (1951).

continue to pay only one gross receipts tax, but it is now applied to the activity of wholesaling rather than the activity of manufacturing. Although the tax rate has changed over the years —it is now forty-four hundredths of one percent, or .44%, of gross receipts—the relevant provisions of Washington's B & O tax are the same today as enacted in 1950.[8]

The constitutionality of the B & O tax has been challenged on several occasions,[9] most strenuously in *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964). In that case a bare majority of the Court upheld the tax; JUSTICE BRENNAN and Justice Goldberg filed dissenting opinions. The bulk of the Court's opinion was devoted to rejecting the claims that the statute unconstitutionally taxed unapportioned gross receipts and did not bear a reasonable relation to the taxpayer's in-state activities. At

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[8]The multiple activities exemption provides:

"(1) [E]very person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

"(2) Persons taxable under RCW 82.04.250 [tax on retailers] or 82.04.270 [tax on wholesalers and distributors] shall not be taxable under RCW 82.04.230 [tax on extractors], 82.04.240 [tax on manufacturers] or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 [tax on certain food processing activities] with respect to extracting or manufacturing of the products so sold.

"(3) Persons taxable under RCW 82.04.240 or RCW 82.04.260 subsection (4) shall not be taxable under RCW 82.04.280 with respect to extracting the ingredients of the products so manufactured." Wash. Rev. Code § 82.04.440 (1986).

[9]See, *e.g., B. F. Goodrich Co.* v. *State, supra; General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964); *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue,* 419 U. S. 560 (1975); *Chicago Bridge & Iron Co.* v. *Washington Dept. of Revenue,* 98 Wash. 2d 814, 669 P. 2d 463, dismissed for want of a substantial federal question, 464 U. S. 1013 (1983).

the end of its opinion, the Court declined to reach the argument that the tax imposed multiple tax burdens on interstate transactions, because the taxpayer had failed to demonstrate "what definite burden, in a constitutional sense" other states' laws had placed on "the identical interstate shipments by which Washington measures its tax." *Id.*, at 449. Justice Goldberg, joined by Justice Stewart and JUSTICE WHITE, dissented because "[t]he burden on interstate commerce and the dangers of multiple taxation" were apparent from the face of the statute. *Id.*, at 459.[10]

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[10]Justice Goldberg explained the functional equivalency for Commerce Clause purposes of the invalidated pre-1950 statute and its successor:

"The burden on interstate commerce and the dangers of multiple taxation are made apparent by considering Washington's tax provisions. The Washington provision here involved—the 'tax on wholesalers'—provides that every person 'engaging within this state in the business of making sales at wholesale' shall pay a tax on such business 'equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent.' Rev. Code Wash. 82.04.270; Wash. Laws 1949, c. 228, § 1 (e). In the same chapter Washington imposes a 'tax on manufacturers' which similarly provides that every person 'engaging within this state in business as a manufacturer' shall pay a tax on such business 'equal to the value of the products . . . manufactured, multiplied by the rate of one-quarter of one per cent.' Rev. Code Wash. 82.04.240; Wash. Laws 1949, c. 228, § 1 (b). Then in a provision entitled 'Persons taxable on multiple activities' the statute endeavors to insure that local Washington products will not be subjected both to the 'tax on manufacturers' and to the 'tax on wholesalers.' Rev. Code Wash. 82.04.440; Wash. Laws 1949, c. 228, § 2-A. Prior to its amendment in 1950 the exemptive terms of this 'multiple activities' provision were designed so that a Washington manufacturer-wholesaler would pay the manufacturing tax and be exempt from the wholesale tax. This provision, on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers. In 1950, however, the 'multiple activities' provision was amended,

(footnote continued on next page)

Comparing the current statute with its invalid predecessor, this dissent concluded that the "amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory." *Id.*, at 460. Today we squarely address the claim that this provision discriminates against interstate commerce.

II

Two appeals are before us. In the first case (No. 85-2006), 71 commercial enterprises filed 53 separate actions for refunds of B & O taxes paid to the State. The Thurston County Superior Court joined the actions, found that the multiple activities exemption did not violate the Commerce Clause, and granted the State Department of Taxation's motion for summary judgment. In the second case (No. 85-1963), Tyler Pipe Products, Inc. (Tyler) sought a refund of B & O taxes paid during the years 1976 through 1980 for its wholesaling activities in Washington. Again, the Superior Court upheld the B & O tax. The Washington Supreme Court affirmed in both cases. 105 Wash. 2d 327, 715 P.2d 128 (1986); 105 Wash. 2d 318, 715 P. 2d 123 (1986).

The State Supreme Court concluded that the B & O tax was not facially discriminatory and rejected the appellants' arguments that our decision invalidating West Virginia's exemption for local

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reversing the tax and the exemption, so that a Washington manufacturer-wholesaler would first be subjected to the wholesale tax and then, to the extent that he is taxed thereunder, exempted from the manufacturing tax. Rev. Code Wash. 82.04.440; Wash. Laws 1950 (special session), c.5, § 2. See *McDonnell & McDonnell* v. *State*, 62 Wash. 2d 553, 557, 383 P. 2d 906, 908. This amended provision would seem to have essentially the same economic effect on interstate sales but has the advantage of appearing nondiscriminatory." *General Motors Corp.* v. *Washington*, 377 U. S. at 459-460 (dissenting opinion).

wholesaler-manufacturers, *Armco Inc.* v. *Hardesty,* 467 U.S. 638 (1984), required that the B & O tax be invalidated. The State Court expressed the view that the West Virginia wholesale tax imposed on out-of-state manufacturers in *Armco* could not be justified as a compensating tax because of the substantial difference between the State's tax rates on manufacturing activities (.0088) and wholesaling activities (.0027), and because West Virginia did not provide for a reduction in its manufacturing tax when the manufactured goods were sold out of State, but did reduce the tax when the goods were partly manufactured out of State. The Washington Supreme Court then concluded that our requirement that a tax must have " 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade," *Armco,* 467 U.S., at 644, was not dispositive because it merely relieved the taxpayer of the burden proving that a tax already demonstrated to be facially discriminatory had in fact resulted in multiple taxation. The Washington Supreme Court also rejected the taxpayers' arguments that the B & O tax is not fairly apportioned to reflect the amount of business conducted in the State and is not fairly related to the services rendered by Washington.

We noted probable jurisdiction of the taxpayers' appeals, 479 U. S. (1986), and now reverse in part and affirm in part. We first consider the claims of the taxpayers that have manufacturing facilities in Washington and market their products in other States; their challenge is directed to the fact that the manufacturing tax is levied only on those goods manufactured in Washington that are sold outside the State. We then consider Tyler's claims that its activities in the State of Washington are not sufficient to subject it to the State's taxing jurisdiction and that the B & O tax is not fairly apportioned.

III

A person subject to Washington's wholesale tax for an item is not subject to the State's manufacturing tax for the same item. This statutory exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*. West Virginia imposed a gross receipts tax at the rate of .27% on persons engaged in the business of selling tangible property at wholesale. Local manufacturers were exempt from the tax, but paid a manufacturing tax of .88% on the value of products manufactured in the State. Even though local manufacturers bore a higher tax burden in dollars and cents, we held that their exemption from the wholesale tax violated the principle that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." 467 U. S., at 642.

In explaining why the tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp.* v. *Washington*, 377 U. S., at 459. We explained:

> "The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp.* v. *Washington*, 377 U. S. 436, 459 (1964) (Goldberg, J., dissenting) (similar provision in Washington, 'on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the

competing sales of interstate sellers'); *Columbia Steel Co.* v. *State*, 30 Wash. 2d 658, 664, 192 P. 2d 976, 979 (1948) (invalidating Washington tax)." 467 U. S., at 642.

Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms appellee's efforts to limit the reasoning of *Armco* to the precise statutory structure at issue in that case. Justice Goldberg expressly rejected the distinction appellee attempts to draw between an exemption from a wholesaling tax—as was present in *Armco*—and the exemption from a manufacturing tax which was present in *General Motors* and is again present in these cases. See 377 U. S., at 459-460. Our holding in *Armco* requires that we now agree with Justice Goldberg's conclusion that the exemption before us is the practical equivalent of the exemption that the Washington Supreme Court invalidated in 1948.

General Motors is not a controlling precedent. As we have already noted, the result in that case did not depend on the Court's resolution of whether the tax burdened interstate commerce. Our reason for not passing on that question was that the taxpayer had "not demonstrated what definite burden, in a constitutional sense [the tax imposed by other States] places on the identical shipments by which Washington measures its tax." 377 U.S., at 449. Thus, when *General Motors* was decided, the Court required the taxpayer to prove that specific interstate transactions were subjected to multiple taxation in order to advance a claim of discrimination. See also *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U.S. 560, 563 (1975) (rejecting Commerce Clause claim because taxpayer made no showing of risk of multiple taxation). In *Armco*, however, we categorically rejected this requirement. The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legis-

lation enacted by its sister States. See *Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267, 276-278 (1978).[11]

We also reject the Department's contention that the State's imposition of manufacturing tax on local goods sold outside the State should be saved as a valid "compensating tax." As we noted in *Maryland* v. *Louisiana,* 451 U.S. 725, 758 (1981), the "concept of a compensatory tax first requires identification of the burden for which the State is attempting to compensate." In these cases the only burden for which the manufacturing tax exemption is arguably compensatory is the State's imposition of a wholesale tax on the local sales of local manufacturers; absent the exemption, a local manufacturer might be at an economic disadvantage because it would pay both a manufacturing and a wholesale tax, while the manufacturer from afar would pay only the wholesale tax. The State's justification for thus taxing the manufacture of goods in interstate commerce, however, fails under our precedents. The local sales of out-of-state manufacturers are also subject to Washington's wholesale tax, but the multiple activities exemption does not extend its ostensible compensatory benefit to those manufacturers. The exemption thus does not merely erase a tax incentive to engage in interstate commerce instead of intrastate commerce; it affirmatively places interstate commerce at a disadvantage.

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[11]In *Armco Inc.* v. *Hardesty,* 467 U.S. 638 (1984), we quoted with approval the following sentence from the Court's opinion in *Freeman* v. *Hewit,* 329 U.S., at 256:

"The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." See 467 U.S., at 645, n. 8.

The Washington Supreme Court also relied on *Freeman* v. *Hewit* in *Columbia Steel Co.* v. *State,* 30 Wash. 2d, at 663, 192 P. 2d, at 978.

"[T]he common theme running through the cases in which this Court has sustained compensating" taxes is "[e]qual treatment of interstate commerce." *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318, 331 (1977). See also *Maryland* v. *Louisiana,* 451 U.S., at 759. In *Boston Stock Exchange,* a New York transfer tax on securities transactions taxed transactions involving an out-of-state sale more heavily than other transactions involving an in-state sale. We invalidated the tax, rejecting the State's claim that it was compensatory legislation designed to neutralize the competitive advantage enjoyed by stock exchanges outside New York. We concluded:

> "Because of the delivery or transfer in New York, the seller cannot escape tax liability by selling out of State, but he can substantially reduce his liability by selling in State. The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than 'compensating' New York for a supposed competitive disadvantage resulting from § 270, the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S., at 331.

Similarly, in *Maryland* v. *Louisiana,* 451 U.S. 725 (1981), we held that a tax on the first use in Louisiana of gas brought into the State was not a "complement of a severance tax in the same amount imposed on gas produced within the State." *Armco,* 467 U.S., at 642–643, citing *Maryland* v. *Louisiana,* 451 U.S., at 758–759. We relied on the observation that severance and first use were not "substantially equivalent" events on which mutually compensating taxes might be imposed. And in *Armco* we squarely held that manufacturing and wholesaling are not substantially equivalent activities. As we wrote in that case:

> "The gross sales tax imposed on Armco cannot be deemed a 'compensating tax' for the manufacturing tax imposed on its West Virginia competitors. . . . Here, too, manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales." 467 U.S., at 642–643.

See also *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263, 272 (1984). In light of the facially discriminatory nature of the multiple activities exemption, we conclude, as we did in *Armco,* that manufacturing and wholesaling are not "substantially equivalent events" such that taxing the manufacture of goods sold outside the State can be said to compensate for the State's inability to impose a wholesale tax on those goods.[12]

Appellee also contends that its B & O tax is valid because of its asserted similarities to a tax and exemption system we have upheld. The State assessed a use tax on personal property used within the State but originally purchased elsewhere to compensate for the burden that a sales tax placed on similar property purchased within the State. See *Henneford* v. *Silas Mason Co.,* 300 U. S. 577 (1937). Appellants' reliance on *Henneford* v. *Silas Mason Co.,* however, does not aid their cause. That case addressed a use tax imposed by the State of Washington on the "privilege of using within this state any article of tangible personal property." The tax did not apply to "the use of any article of tangible

[12]Nor may the tax be justified as an attempt to compensate the State for its inability to impose a similar burden on out-of-state manufacturers whose goods are sold in Washington, for Washington subjects those sales to wholesale tax.

personal property" the sale or use of which had already been taxed at an equal or greater rate under the laws of Washington or some other state. *Id.*, at 580–581. We upheld the tax because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. This identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax had already been paid,[13] regardless of whether the sales tax had been paid to Washington or to another State.[14] As we explained in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963):

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[13]Many States provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereignties have jurisdiction to tax parts of the same chain of commercial events. For example, the District of Columbia and all but three States with sales and use taxes provide a credit against their own use taxes for sales taxes paid to another State, although reciprocity may be required. See CCH State Tax Guide 6018–6014 (1986); *Williams* v. *Vermont*, 472 U.S. 14, 22 (1985). See also *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 74–75 (1963).

[14]In his opinion for the Court in *Henneford* v. *Silas Mason Co.*, Justice Cardozo carefully described the relationship between the 2% "tax on retail sales" imposed by Title III of Washington's 1935 tax code and the "compensating tax" imposed by Title IV on the privilege of use. The compensating use tax was imposed on the use of an article of tangible personal property which had been purchased at retail but had not been subjected to a sales tax that was equal to or in excess of that imposed by the State of Washington. If the rate of the tax imposed by another jurisdiction was less than 2%, the rate of the compensating tax was measured by the difference. Explaining why such a compensating tax does not discriminate against interstate commerce, Justice Cardozo wrote:

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true

(footnote continued on next page)

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington. The multiple activities exemption only operates to impose a unified tax eliminating the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried out within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State. Washington's B & O tax scheme is therefore inconsistent with our precedents holding that a tax violates the Commerce Clause "when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Washington Dept. of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 738 (1978).

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where the offsetting tax became payable to Washington by reason of purchase or use within the state. *It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there.* No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he had paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." 800 U.S., at 583–584 (emphasis added).

As we explained in *Armco,* our conclusion that a tax facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States:

> "Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test. In *Container Corp. of America* v. *Franchise Tax Board,* 463 U. S. 159, 169 (1983), the Court noted that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. See also *id.,* at 170–171. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." 467 U.S., at 644–645 (footnote omitted).[15]

[15]Even the solitary dissenting opinion in the *Armco* case did not question the proposition that the constitutionality of the West Virginia tax could properly be discerned merely by referring to the text of the tax statute itself: "It is plain that West Virginia's tax would be unconstitutionally discriminatory if it levied no tax on manufacturing or taxed manufacturing at a lower rate than wholesaling, for then the out-of-state wholesaler would be paying a higher tax than the in-state manufacturer-wholesaler." 467 U. S., at 646 (REHNQUIST, J., dissenting)

Instead, the dissent argued that West Virginia's taxing scheme, taken in its entirety, did not discriminate against out-of-state manufacturers because the manufacturing tax paid by a local manufacturer-wholesaler was much higher than the wholesale tax exacted from an out-of-state manufacturer.

We conclude that Washington's multiple activities exemption discriminates against interstate commerce as did the tax struck down by the Washington Supreme Court in 1948 and the West Virginia tax that we invalidated in *Armco.* The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt. The fact that the B & O tax "has the advantage of appearing nondiscriminatory," see *General Motors Corp.,* 377 U.S., at 460 (Goldberg, J., dissenting), does not save it from invalidation. To the extent that this conclusion is inconsistent with the Court's ruling in the *General Motors* case, that case is overruled.[16]

IV

Our holding that Washington's tax exemption for a local manufacturer-wholesaler violates the Commerce Clause disposes of the issues raised by those appellants in *National Can* that manufacture goods in Washington and sell them outside the State, as well as the claim of discrimination asserted by those appellants that manufacture goods outside Washington and sell them within the State. Compliance with our holding on the discrimination issue, however, would not necesarily preclude the continued assessment of a wholesaling tax. Either a repeal of the manufacturing tax or an expansion of the multiple-activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination. We must therefore also consider the alternative challenge to the wholesale tax advanced by Tyler and

[16]In view of our holding on the discrimination issue, we need not reach the claim of local state manufacturers selling to interstate markets that the tax scheme does not fairly apportion tax liabilities between Washington and other States.

the other appellants that manufacture products outside of Washington for sale in the State.

Tyler seeks a refund of wholesale taxes it paid on sales to customers in Washington for the period from January 1, 1976 through September 30, 1980. These products were manufactured outside of Washington. Tyler argues that its business does not have a sufficient nexus with the State of Washington to justify the collection of a gross receipts tax on its sales. Tyler sells a large volume of cast iron, pressure and plastic pipe and fittings, and drainage products in Washington, but all of those products are manufactured in other States. Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle.

The trial court found that the in-state sales representative engaged in substantial activities that helped Tyler to establish and maintain its market in Washington. The State Supreme Court concluded that those findings were supported by the evidence, and summarized them as follows:

> "The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe's customers. Through sales contracts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe.
>
> "Tyler Pipe sells in a very competitive market in Washington. The sales representatives provide Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing prod-

ucts; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market. The sales representatives in Washington have helped Tyler Pipe and have a special relationship to that corporation. The activities of Tyler Pipe's agents in Washington have been substantial." 105 Wash., at 325, 715 P. 2d, at 127.

As a matter of law, the Washington Supreme Court concluded that this showing of a sufficient nexus could not be defeated by the argument that the taxpayer's representative was properly characterized as an independent contractor instead of as an agent. We agree with this analysis. In *Scripto, Inc. v. Carson,* 362 U. S. 207 (1960), Scripto, a Georgia corporation, had no office or regular employees in Florida, but it employed wholesalers or jobbers to solicit sales of its products in Florida. We held that Florida may require these solicitors to collect a use tax from Florida customers. Although the "salesmen" were not employees of Scripto, we determined that "such a fine distinction is without constitutional significance." *Id.,* at 211. This conclusion is consistent with our more recent cases. See *National Geographic Society* v. *California Equalization Board,* 430 U. S. 551, 556–558 (1977).

As the Washington Supreme Court determined, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." 105 Wash. 2d, at 323, 715 P. 2d, at 126. The Court found this standard was satisfied because Tyler's "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests . . . ." *Id.,* at 321, 715 P. 2d, at 125. We agree that the

activities of Tyler's sales representatives adequately support the State's jurisdiction to impose its wholesale tax on Tyler.

Tyler also asserts that the B & O tax does not fairly apportion the tax burden between its activities in Washington and its activities in other States. See *Complete Auto Transit, Inc.* v. *Brady,* 430 430 U. S. 274, 285 (1977). Washington taxes the full value of receipts from in-state wholesaling or manufacturing; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events in invalidating the multiple activities exemption. Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See *Moorman Mfg. Co.* v. *Bair,* 437 U.S., at 280–281 (gross receipts tax on sales to customers within state would be "plainly valid"); *Standard Pressed Steel Co.* v. *Washington Revenue Dept.,* 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

V

The Department of Revenue argues that any adverse decision in these cases should not be applied retroactively because the taxes at issue were assessed prior to our opinion in *Armco* and

the holding in that case was not clearly foreshadowed by earlier opinions. See *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106–107 (1971) (factors to consider in deciding whether to impose decision prospectively only). The State's argument is similar to an argument advanced by the State of Hawaii in *Bacchus Imports, Ltd.* v. *Dias,* 468 U. S., at 276–277. The State urged that, if we invalidated the tax at issue, we should not require the payment of refunds to taxpayers. We did not resolve the merits of that issue, concluding that this Court should not take it upon itself in this complex area of state tax structures to determine how to apply its holding:

> "These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law. Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion."

We followed this approach in *Williams* v. *Vermont,* 472 U. S. 14, 28 (1985), an opinion which invalidated the State's residency restriction on the availability of a sales tax credit for use tax paid to another state. We expressed no opinion on the appropriate remedy, instead remanding to the Supreme Court of Vermont "in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, see *Bacchus Imports, Ltd.* v. *Dias,* 468 U. S. 263, 277 (1984) . . . ." *Cf. Hooper* v. *Bernalillo County Assessor,* 472 U. S. 612, 622–623 (1985). We

conclude that it is likewise appropriate for the Supreme Court of Washington to address in the first instance the refund issues raised by our rulings in these cases.

VI

We hold Washington's multiple activities exemption invalid because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt. We reject appellant Tyler's nexus and fair apportionment challenges to the State's wholesale tax. Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand. Accordingly, we vacate the judgments of the Supreme Court of Washington and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 85-1963 AND 85-2006

TYLER PIPE INDUSTRIES, INC., APPELLANT

85-1963 *v.*

WASHINGTON DEPARTMENT OF REVENUE

NATIONAL CAN CORPORATION, ET AL., APPELLANTS

85-2006 *v.*

WASHINGTON STATE DEPARTMENT OF REVENUE

ON APPEALS FROM THE SUPREME COURT OF WASHINGTON

[June 23, 1987]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins in Part I, concurring in part and dissenting in part.

I join Part IV of the Court's opinion, upholding Washington's unapportioned wholesale tax and rejecting Tyler Pipe's claim that it did not have a sufficient nexus with Washington to give the State taxing jurisdiction. I dissent, however, from the remainder of the opinion, invalidating the State's manufacturing tax as unconstitutionally discriminatory under the Commerce Clause. The standard for discrimination adopted by the Court, which drastically limits the State's discretion to structure their tax systems, has no basis in the Constitution, and is not required by our past decisions.

I

Implicitly in this case, *ante,* at 12–15, and explicitly in *American Trucking Assns., Inc.* v. *Scheiner,* U.S. (1987), the Court imposes on state taxes a requirement of "internal consistency," demanding that they " 'be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco Inc.* v. *Hardesty,* 467 U.S. 638, 644 (1984) (quoting *Container Corp. of America* v.

Franchise Tax Board, 463 U. S. 159, 169 (1983))[1] It is clear, for the reasons given by the Court, *ante,* at 13–14, that the Washington business and occupation (B & O) tax fails that test. So would any unapportioned flat tax on multistate activities, such as the axle tax or marker fee at issue in *Scheiner, supra.* It is equally clear to me, however, that this internal consistency principle is nowhere to be found in the Constitution. Nor is it plainly required by our prior decisions. Indeed, in order to apply the internal consistency rule in this case, the Court is compelled to overrule a rather lengthy list of prior decisions, from *Hinson* v. *Lott,* 8 Wall, 148 (1869), to *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964), and including, as is made explicit in *Scheiner, supra, Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542 (1950), *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n,* 295 U. S. 285 (1935). Moreover, the Court must implicitly repudiate the approval given in dicta 10 years ago to New York's pre-1968 transfer tax on securities. See *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318, 330 (1977).[2]

[1]The majority finds Washington's manufacturing tax exemption for local wholesalers discriminatory because it "excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." *Ante,* at 13. That exclusion, however, can only be deemed *facially* discriminatory if one assumes that every State's taxing scheme is identical to Washington's.

[2]The New York statute taxed, *inter alia,* both the sale and delivery of securities if either event occurred in New York, 429 U. S., at 321, but imposed only one tax if both events occurred in that State. While the Court invalidated as discriminatory an amendment to that law reducing the tax for in-state sales by nonresidents and placing a cap on the tax payable on transactions involving in-state sales, it also declared that the statute prior to the amendment "was neutral as to in-state and out-of-state sales." *Id.,* at 330. That is plainly not true if internal consistency is a requirement of neutrality; assuming that all States had New York's pre-1968 scheme, if sale and delivery both took place in New York, there would be a single tax, while if sale took place in New York and delivery in New Jersey, there would be double taxation.

Finally, we noted only two Terms ago—and one Term after *Armco, supra,* was decided—that we had never held that "a State must credit a sales tax paid to another State against its own use tax." *Williams* v. *Vermont,* 472 U. S. 14, 21–22 (1985). See *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167, 172 (1939). If we had applied an internal consistency rule at that time, the need for such a credit would have followed as a matter of mathematical necessity. The Court's presumed basis for creating this rule now, 198 years after adoption of the Constitution, is that the reasoning of *Armco* requires it. See *Scheiner, supra,* at ____. In my view, however, that reasoning was dictum, which we should explicitly reject. And if one insists on viewing it as holding, and thus as conflicting with decades of precedents upholding internally inconsistent state taxes, it seems to me that *Armco* rather than those numerous other precedents ought to be overruled.

Prior to *Armco,* the internal consistency test was applied only in cases involving apportionment of the net income of businesses that more than one State sought to tax. That was the issue in *Container Corp., supra,* see 463 U. S., at 169–171, the only case cited by *Armco* in support of an internal consistency rule, see 467 U. S., at 644–645, and there is no reason automatically to require internal consistency in other contexts. A business can of course earn net income in more than one State, but the total amount of income is a unitary figure. Hence, when more than one State has taxing jurisdiction over a multistate enterprise, an inconsistent apportionment scheme could result in taxation of more than 100 percent of that firm's net income. Where, however, tax is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States, that apportionment principle is not applicable; there is simply no unitary figure or event to apportion. That we

have not traditionally applied the internal consistency test outside the apportionment context is amply demonstrated by the lengthy list of cases that the Court has (openly or tacitly) had to overrule here and in *Scheiner*.

It is possible to read *Armco* as requiring such a test in all contexts, but it is assuredly not necessary to do so. *Armco* dealt with West Virginia's 0.27% selling tax and 0.88% manufacturing tax, and its exemption from the selling tax for in-state but not out-of-state manufacturers. We discussed the internal consistency of that taxing scheme only after finding the selling tax discriminatory "[o]n its face," 467 U.S., at 642, because "[t]he tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Ibid.* Combined with the finding that the selling tax imposed on out-of-state producers could not be deemed to "compensate" for the higher manufacturing tax imposed only on West Virginia producer/sellers, *id.*, at 642-643, that was enough to invalidate the tax. We went on to address the internal consistency rule in response to the State's argument that the taxpayer had not shown "actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia." *Id.*, at 644. After reciting the internal consistency principle applicable in apportionment cases, we said that "[a] similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce," *ibid.*, regardless of "the shifting complexities of the tax codes of 49 other States. . . . " *Id.*, at 645. The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has

occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to revolutionize the law of state taxation, is remarkable.

Rather than use isolated language, written with no evident consideration of its potential significance if adopted as a general rule, to overturn a lengthy list of settled decisions, one would think that we would instead use the settled decisions to limit the scope of the isolated language. As the cases from the past few Terms indicate, the internal consistency test invalidates a host of taxing methods long relied upon by the States and left unhampered by Congress. We are already on shaky ground when we invoke the Commerce Clause as a self-operative check on state legislation, see Part II, *infra*, requiring us to develop rules unconstrained by the text of the Constitution. Prudence counsels in favor of the least intrusive rule possible.

Applying more traditional tests, the Washington B & O tax is valid. It is not facially discriminatory. Unlike the West Virginia tax in *Armco*, Washington's selling tax is imposed on all goods, whether produced in-state or out-of-state. No manufacturing tax is (or could be) imposed on out-of-state manufacturers, so no discrimination is present (or possible) there. All the State does is to relieve local producer/sellers from the burden of double taxation by declining to assess a manufacturing tax on local businesses with respect to goods on which a selling tax is paid. Nor does this arrangement, notwithstanding its nondiscriminatory appearance, have discriminatory effects in and of itself. An in-state manufacturer selling in-state pays one tax to Washington; an in-state manufacturer selling out-of-state pays one tax to Washington; and an out-of-state manufacturer selling in-state pays one tax to Washington. The State collects the same tax whether interstate or

intrastate commerce is involved. The tax can be considered to have discriminatory effects only if one consults what other States are in fact doing (a case-by-case inquiry that appeals to no one, *ante*, at ____) or unless one adopts an assumption as to what other States are doing. It is the latter course that the internal consistency rule adopts, assuming for purposes of our Commerce Clause determination that other States have the same tax as the tax under scrutiny. As noted earlier, I see no basis for that assumption in the tradition of our cases; and I see little basis for it in logic as well. Specifically, I see no reason why the fact that other States, by adopting a *similar* tax, might cause Washington's tax to have a discriminatory effect on interstate commerce, is of any more significance than the fact that other States, by adopting a *dissimilar* tax, might produce such a result. The latter, of course, does not suffice to invalidate a tax. To take the simplest example: A tax on manufacturing (without a tax on wholesaling) will have a discriminatory effect upon interstate commerce if another State adopts a tax on wholesaling (without a tax on manufacturing)—for then a company manufacturing and selling in the former State would pay only a single tax, while a company manufacturing in the former state but selling in the latter State would pay two taxes. When this very objection was raised in *Armco*, we replied that, unlike the situation in *Armco* itself, "such a result would not arise from impermissible discrimination against interstate commerce . . . ." 467 U.S., at 645. That response was possible there, because the West Virginia tax was facially discriminatory; it is not possible here because the Washington B & O tax is not.

It seems to me that we should adhere to our long tradition of judging State taxes on their own terms, and that there is even less justification for striking them down on the basis of assumptions as to what other States *might* do than there is for striking them

down on the basis of what other States *in fact* do. Washington's B & O tax is plainly lawful on its own. It may well be that other States will impose similar taxes that will increase the burden on businesses operating interstate—just as it may well be that they will impose *dis*similar taxes that have the same effect. That is why the Framers gave Congress the power to regulate interstate commerce. Evaluating each State's taxing scheme on its own gives this Court the power to eliminate evident discrimination, while at the same time leaving the States an appropriate degree of freedom to structure their revenue measures. Finer tuning than this is for the Congress.

II

I think it particularly inappropriate to leap to a restrictive "internal consistency" rule, since the platform from which we launch that leap is such an unstable structure. It takes no more than our opinions this term, and the number of prior decisions they explicitly or implicitly overrule, to demonstrate that the practical results we have educed from the so-called "negative" Commerce Clause form not a rock but a "quagmire," *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458 (1959). Nor is this a recent liquifaction. The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, see *Case of the State Freight Tax,* 15 Wall. 232 (1873), and in the 50 years prior to that in which it was alluded to in various dicta of the Court, see *Cooley* v. *Board of Wardens,* 12 How. 299, 319 (1852); *Gibbons* v. *Ogden,* 9 Wheat. 1, 209 (1824); *id.,* at 226-229, 235-239 (Johnson, J., concurring in judgment), our applications of the doctrine have, not to put too fine a point on the matter, made no sense. See generally D. Currie, The Constitution in the Supreme

Court: The First Hundred Years 1789-1888, pp. 168-181, 222-236, 330-342, 403-416 (1985).[3]

That uncertainty in application has been attributable in no small part to the lack of any clear theoretical underpinning for judicial "enforcement" of the Commerce Clause. The text of the Clause states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. On its face, this is a charter for Congress, not the courts, to ensure "an area of trade free from interference by the States." *Boston Stock Exchange,* 429 U.S., at 328. The pre-emption of state legislation would automatically follow, of course, if the grant of power to Congress to regulate interstate commerce were exclusive, as Charles Pinckney's draft constitution would have provided, [sic] see Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 434 (1941), and as John Marshall at one point seemed to believe it was. See *Gibbons*

[3]Professor Currie's discussion of the Commerce Clause decisions of the Marshall and Taney Courts is summed up by his assessment of the leading Taney Court decision: "Taken by itself, *Cooley* [v. *Board of Wardens,* 12 How. 299 (1852)] may appear arbitrary, conclusory, and irreconcilable with the constitutional text. Nevertheless, anyone who has slogged through the Augean agglomeration preceding Curtis's labors must find them scarcely less impressive than those of the old stable-cleaner himself." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, p. 234 (1985). He concludes his discussion of the Chase Court's Commerce Clause jurisprudence by noting, "In doctrinal terms the Court's efforts in this field can be described only as a disaster." *Id.,* at 342 (footnote omitted). And the Waite Court receives the following testimonial: "It is a relief that with the *Bowman* decision [*Bowman* v. *Chicago & Northwestern R. Co.,* 125 U.S. 465 (1888)] we have reached the end of the commerce clause decisions of the Waite period, for they do not make elevating reading." *Id.,* at 416 (footnote omitted). Future commentators are not likely to treat recent eras much more tenderly.

v. *Ogden*, *supra*, at 209. However, unlike the District Clause, which empowers Congress "To exercise exclusive Legislation," Art. I, § 8, cl. 17, the language of the Commerce Clause gives no indication of exclusivity. See *License Cases*, 5 How. 504, 579 (1847) (opinion of Taney, C. J.). Nor can one assume generally that Congress' Article I powers are exclusive; many of them plainly coexist with concurrent authority in the States. See *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 479 (1974) (patent power); *Goldstein* v. *California*, 412 U.S. 546, 560 (1973) (copyright power); *Houston* v. *Moore*, 5 Wheat. 1, 25 (1820) (court martial jurisdiction over the militia); *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193–196 (1819) (bankruptcy power). Furthermore, there is no correlative denial of power over commerce to the States in Art. I, § 10, as there is, for example, with the power to coin money or make treaties. And both the States and Congress assumed from the date of ratification that at least some state laws regulating commerce were valid. See *License Cases*, *supra*, at 580–581. The exclusivity rationale is infinitely less attractive today than it was in 1847. Now that we know interstate commerce embraces such activities as growing wheat for home consumption, *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and local loan sharking, *Perez* v. *United States*, 402 U.S. 146 (1971), it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.

Another approach to theoretical justification for judicial enforcement of the Commerce Clause is to assert, as did Justice Curtis in dicta in *Cooley* v. *Board of Wardens*, *supra*, at 319, that "[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." That would perhaps be a wise rule to

adopt (though it is hard to see why judges rather than legislators are fit to determine what areas of commerce "in their nature" require national regulation), but it has the misfortune of finding no conceivable basis in the text of the Commerce Clause, which treats "Commerce . . . among the several States" as a unitary subject. And attempting to limit the Clause's pre-emptive effect to state laws *intended* to regulate commerce (as opposed to those intended, for example, to promote health), see *Gibbons* v. *Ogden, supra,* at 203, while perhaps a textually possible construction of the phrase "regulate Commerce," is a most unlikely one. Distinguishing between laws with the *purpose* of regulating commerce and "police power" statutes with that *effect* is, as Taney demonstrated in the *License Cases, supra,* at 582–583, more interesting as a metaphysical exercise than useful as a practical technique for marking out the powers of separate sovereigns.

The least plausible theoretical justification of all is the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is merely interpreting the will of Congress, whose silence in certain fields of interstate commerce (but not in others) is to be taken as a prohibition of regulation. There is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action. There, as elsewhere, "Congress' silence is just that—silence. . . ." *Alaska Airlines, Inc.* v. *Brock,* 480 U.S. , (1987). See Currie, *supra* n. 2, at 334 (noting "the recurring fallacy that in some undefined cases congressional inaction was to be treated as if it were permissive or prohibitory legislation—though the Constitution makes clear that Congress

can act only by affirmative vote of both Houses" (footnotes omitted)).[4]

The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce. The strongest evidence in favor of a negative Commerce Clause—that version of it which renders federal authority over interstate commerce exclusive—is Madison's comment during the Convention that "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. Farrand, Records of the Federal Convention of 1787, p. 625 (1937). This comment, however, came during discussion of what became Art. I, § 10, cl. 3: "No State shall, without the Consent of Congress, lay any Duty of Tonnage. . . ." The fact that it is difficult to conceive how the power to regulate commerce would *not* include the power to impose duties; and the

[4]Unfortunately, this "legislation by inaction" theory of the negative Commerce Clause seems to be the only basis for the doctrine, relied upon by the Court in *Scheiner,* U.S., at , n. 23, that Congress can authorize States to enact legislation that would otherwise violate the negative Commerce Clause. See *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946). Nothing else could explain the *Benjamin* principle that what was invalid state action can be rendered valid state action through "congressional consent." There is surely no area in which Congress can permit the States to violate the Constitution. Thus, in *Cooley* v. *Board of Wardens,* 12 How. 299 (1852), Justice Curtis, to whom there had not occurred the theory of congressional legislation by inaction, wrote of the relationship between States and the negative Commerce Clause as follows: "If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this Act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power." *Id.,* at 318.

fact that, despite this apparent coverage, the Convention went on to adopt a provision prohibiting States from levying duties on tonnage without congressional approval; suggest that Madison's assumption of exclusivity of the federal commerce power was ill considered and not generally shared.

Against this mere shadow of historical support there is the overwhelming reality that the Commerce Clause, in its broad outlines, was not a major subject of controversy, neither during the constitutional debates nor in the ratifying conventions. Instead, there was "nearly universal agreement that the federal government should be given the power of regulating commerce," Abel, 25 Minn. L. Rev., at 443–444, in much the form provided. "The records disclose no constructive criticisms by the states of the commerce clause as proposed to them." F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite 12 (1937). In The Federalist, Madison and Hamilton wrote numerous discourses on the virtues of free trade and the need for uniformity and national control of commercial regulation, see The Federalist No. 7, pp. 62-63 (C. Rossiter ed. 1961); *id.*, No. 11, pp. 89–90; *id.*, No. 22, pp. 143–145; *id.*, No. 42, pp. 267–269; *id.* No. 53, p. 333, but said little of substance specifically about the Commerce Clause—and that little was addressed primarily to foreign and Indian trade. See generally Abel, *supra,* at 470–474. Madison does not seem to have exaggerated when he described the Commerce Clause as an addition to the powers of the national government "which few oppose and from which no apprehensions are entertained." The Federalist No. 45, p. 293. I think it beyond question that many "apprehensions" would have been "entertained" if supporters of the Constitution had hinted that the Commerce Clause, despite its language, gave this Court the power it has since assumed. As Justice Frankfurter pungently

put it: "the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community . . . [is] an audacious doctrine, which, one many be sure, would hardly have been publicly avowed in support of the adoption of the Constitution." Frankfurter, *supra,* at 19.

In sum, to the extent that we have gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States")—the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.

SUPREME COURT OF THE UNITED STATES

Nos. 85-1963 AND 85-2006

TYLER PIPE INDUSTRIES, INC., APPELLANT
85-1963 *v.*
WASHINGTON DEPARTMENT OF REVENUE

NATIONAL CAN CORPORATION, ET AL., APPELLANTS
85-2006 *v.*
WASHINGTON STATE DEPARTMENT OF REVENUE

ON APPEALS FROM THE SUPREME COURT OF WASHINGTON

[June 23, 1987]

JUSTICE O'CONNOR, concurring.

I join the Court's opinion holding that "[i]n light of the facially discriminatory nature of the multiple activities exemption," *ante,* at 11, see *Maryland* v. *Louisiana,* 451 U. S. 725, 756–757 (1981), the Washington taxpayers need not prove actual discriminatory impact "by an examination of the tax burdens imposed by other States." *Ante,* at 14. I do not read the Court's decision as extending the "internal consistency" test described in *Armco Inc.* v. *Hardesty,* 467 U. S. 638, 644–645 (1984), to taxes that are not facially discriminatory, contra, *post,* at 4 (SCALIA, J., concurring in part and dissenting in part), nor would I agree with such a result in this case. See *American Trucking Assns., Inc.* v. *Scheiner,* —— U.S. —— (1987) (O'CONNOR, J., dissenting).

51910-2; 51110-1

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NATIONAL CAN CORPORATION., KALAMA CHEMICAL, INC., and XEROX CORPORATION,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

No. 51910-2

TYLER PIPE INDUSTRIES, INC., a Delaware corporation,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

No. 51110-1

En Banc

Filed Jan. 28, 1988

UTTER, J.—This is a remand from the United States Supreme Court where various commercial enterprises (taxpayers) claimed Washington's multiple activities exemption to the business and occupation (B & O) tax, RCW 82.04.440, discriminated against interstate commerce in violation of the commerce clause, U.S. Const. art 1, § 8. In *Tyler Pipe Indus., Inc. v. Washington Dep't of Rev.*, 55 U.S.L.W. 4978 (U.S. June 23, 1987) (hereinafter *Tyler*) the United States Supreme Court vacated and remanded this court's decisions in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d 318, 715 P.2d 123 (1986) (hereinafter *Tyler Pipe*) and

National Can Corp. v. Department of Rev., 105 Wn.2d 327, 715 P.2d 128 (1986) (hereinafter *National Can*). In *Tyler Pipe* and *National Can*, this court held Washington's B & O tax exemption was valid under the commerce clause in that (1) there was a sufficient nexus between the interstate activities and the State, (2) it was fairly apportioned, (3) it was fairly related to the services provided, and (4) it did not discriminate against interstate commerce. The United States Supreme Court held there was sufficient nexus, and the tax was fairly apportioned, but found the multiple activities exemption discriminated against interstate commerce. The Court then remanded to this court to decide the refund issues raised by its ruling.

The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate.

I. STATE LAW

In order to reach the retroactivity issue, this court must first decide if Washington state statutory law or state case law mandates refunds of taxes paid prior to the Supreme Court's *Tyler* decision. If this state's tax refund statutes, RCW 82.04.4286 and RCW 82.32.060 apply, then all other issues are irrelevant.

This court has stated that, if a tax were in violation of the due process or commerce clauses, it would also be in violation of RCW 82.04.430(6) (subsequently recodified as RCW 82.04.4286). *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 819, 659 P.2d 463 (1983). However, taxpayers' argument based on *Chicago Bridge* misconstrues the more basic inquiry at issue here. If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds. However, if the court finds the *Tyler* holding is to be applied only pro-

spectively, then for the purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected. The statutory argument ignores the very meaning of prospective application. Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional. This court recently found a part of Washington's sales tax to be unconstitutional and yet gave only prospective application to its decision and afforded no refunds to taxpayers. *Bond v. Burrows,* 103 Wn.2d 153, 690 P.2d 1168 (1984). *See also Cascade Sec. Bank v. Butler,* 88 Wn.2d 777, 786, 567 P.2d 631 (1977); *State ex rel. Finance Comm. v. Martin,* 62 Wn.2d 645, 673, 384 P.2d 833 (1963).

II. RETROACTIVE OR PROSPECTIVE APPLICATION OF *TYLER*

Since Washington law does not foreclose an inquiry into prospective application, we turn to the factors enunciated by the United States Supreme Court to determine whether prospective application is to be afforded in this case. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) sets out the three factors to be considered in deciding whether to give retroactive or prospective effect to a new rule in a federal civil case. *Tyler,* 55 U.S.L.W. at 4984. Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application. *Chevron Oil,* at 106-07. (Although the tests for retroactive application in criminal cases have recently been reworked, the inquiry in civil cases is still controlled

by *Chevron Oil. Griffith v. Kentucky,* 479 U.S. , 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).)

A. NEW PRINCIPLE OF LAW

The threshold factor necessary for prospective application is a finding that the *Tyler* decision established a new principle of law overruling past precedent on which litigants may have relied. *Chevron Oil,* 404 U.S. at 106. This court's unanimous decisions in *National Can* and *Tyler Pipe,* the long line of cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler,* all compel the conclusion that *Tyler* did establish new principles of law.

In 1984 the United States Supreme Court invalidated West Virginia's wholesale gross receipts tax because it discriminated against interstate commerce. *Armco Inc. v. Hardesty,* 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). In *National Can,* this court distinguished *Armco* based on the belief that Washington's selling and manufacturing taxes were exacted to address the same state burdens and hence were compensatory and therefore substantially equivalent. This court distinguished West Virginia's tax (which imposed substantially different tax rates on manufacturing and on wholesaling) from Washington's tax (which imposed identical rates on each activity), and reasoned that this difference was one reason which had precluded the Supreme Court from finding the West Virginia taxes to be compensatory.

We further held that the "internal consistency" rule is not applicable to a determination of discrimination in a gross receipts tax case. It was our belief that the Court in *Armco* had used the internal consistency concept only in the determination of whether Armco Inc. had to show actual harm once it had demonstrated

the tax was facially discriminatory. For this reason we held the Washington tax was not facially discriminatory, and relied on previous holdings of the United States Supreme Court which had upheld Washington's B & O tax against commerce clause challenges and which were not expressly overruled in *Armco.*

The Supreme Court held, however, that the multiple activities exemption was facially discriminatory, and that manufacturing and wholesaling are not substantially equivalent activities. *Tyler,* at 4982. The Court also held that the "internal consistency" rule was indeed to be applied in a gross receipts case where the allegation is that a tax on its face discriminates against interstate commerce. *Tyler,* at 4983. The *Tyler* Court concluded the B & O tax exposes out-of-state manufacturing or selling activity to a multiple burden from which only manufacturing in-state and selling in-state is exempt. The Court stated that to the extent its conclusion was inconsistent with its ruling in *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) that case was overruled.

Our unanimous decision in *National Can* indicates we did not read *Armco* as foreshadowing the result in *Tyler.* Taxpayers argue, however, that *Armco's* reliance on Justice Goldberg's dissent in *General Motors* clearly informed this court that Washington's tax was unconstitutional. The Supreme Court in *Tyler,* discussing its *Armco* decision, said:

> In explaining why the tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington,* 377 U.S., at 459. We explained:
>
> > "The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the

> property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp. v. Washington,* 377 U.S. 436, 459 (1964) (Goldberg, J., dissenting) *(similar provision in Washington, 'on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers'); Columbia Steel Co. v. State,* 30 Wash. 2d 658, 664, 192 P.2d 976, 979 (1948) (invalidating Washington tax)." 467 U.S., at 642.

(Italics ours.) *Tyler,* 55 U.S.L.W. at 4981. The italicized material is a description of Washington's pre-1950 statute which exempted intrastate *sales* on locally manufactured goods. Even though the *Armco* court did quote Justice Goldberg's *General Motors* dissent, the parenthetical material following that citation referred *not* to the B & O tax statute at issue in *Tyler,* but to the tax which this court struck down in 1948 in *Columbia Steel Co. v. State,* 30 Wn.2d 658, 192 P.2d 976 (1948). Tracing the *Tyler* Court's quote back to Justice Goldberg's dissent in *General Motors,* it appeared that Justic Goldberg was discussing Washington's *old* B & O tax in the sentence which the *Armco* court quoted. *See General Motors,* at 459. This was appropriate in *Armco* inasmuch as the West Virginia statute was similar to Washington's pre-1950 Act. The *Armco* Court's reference to Justice Goldberg's dissent in *General Motors,* without overruling the other cases on which we relied, did not clearly indicate to us the unconstitutionality of Washington's present tax statute. Not until the *Tyler* decision was it clear the Court was agreeing with Justice Goldberg's conclusion regarding Washington's newer B & O tax exemption and that earlier applicable commerce clause cases were being overruled.

Commerce clause challenges to the multiple activities exemption alleging discrimination against interstate commerce have

many times been rejected by this court. *See B.F. Goodrich Co. v. State,* 38 Wn.2d 663, 231 P.2d 325 (1951); *Crown Zellerbach Corp. v. State,* 45 Wn.2d 749, 278 P.2d 305 (1954); *General Motors Corp. v. State,* 60 Wn.2d 862, 376 P.2d 843 (1962); and *Chicago Bridge & Iron Co. v. Department of Rev.,* 98 Wn.2d 814, 659 P.2d 463 (1983). This court was clear in our *National Can* decision that because the West Virginia and Washington taxes differed significantly, we were relying on the

> long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, *see Department of Rev. v. Association of Wash. Stevedoring Cos.,* 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.,* 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) . . .

National Can, at 339-40.

We believe Washington's rationale prior to the United States Supreme Court decision in *National Can* was a reasonable assessment of existing case law. In 1983 we held that Washington's B & O tax was not discriminatory under the commerce clause. *Chicago Bridge & Iron Co.,* 98 Wn.2d at 832. The United States Supreme Court dismissed the appeal "for want of substantial federal question", *Chicago Bridge & Iron Co. v. Washington Dep't of Rev.,* 464 U.S. 1013, 78 L. Ed. 2d 718, 104 S. Ct. 542 (1983). This court in *National Can* said it understood that dismissal to be a "decision on the merits". *National Can Corp. v. Department of Rev.,* 105 Wn.2d 327, 331, 715 P.2d 128 (1986) (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.19, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979)). Since this decision issued only the year before *Armco* and addressed the very question at issue in *National Can,* we believed it to conclude that *Armco* did not clearly foreshadow *Tyler.* This court relied on

the difference in the Washington and West Virginia statutes and, more importantly, directly on past Supreme Court precedent to uphold the B & O tax in *National Can.*

Also supporting the view that *Tyler* announced new law is Justice Scalia's dissent, which states that the *Tyler* decision "has no basis in the Constitution, and is not required by our past decisions" and that to apply the internal consistency rule, the "Court is compelled to overrule a rather lengthy list of prior decisions". *Tyler,* at 4984 (Scalia, J., dissenting). The dissent notes that in *Williams v. Vermont,* 472 U.S. 14, 21–22, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985), decided the term *after Armco,* the Court failed to apply the internal consistency rule. Justice Scalia wrote:

> The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to *revolutionize the law of state taxation, is remarkable.*

(Italics ours). *Tyler,* at 4985 (Scalia, J., dissenting). Justice O'Connor concurred in *Tyler,* but did not read it to impose a requirement that the internal consistency rule be applied absent facial discrimination.

Kalama Chemical, representing in-state manufacturers, argues that as to that group *Tyler* did not enunciate a new principle of law. However, this argument ignores this court's reliance on the concept that selling and manufacturing were believed, until *Tyler,* to be substantially equivalent and therefore compensatory.

Taxpayers argue that a letter from the Department of Revenue to the Governor shows that the Department of Revenue believed

just after the *Armco* decision that Washington's multiple activities exemption was unconstitutional. The letter from Donald Burrows, Director of Department of Revenue, to Governor John Spellman dated June 14, 1984 expresses the belief that the State faced substantial loss of tax revenue as a result of the *Armco* decision, and also expressed the likelihood of refunds. This argument is directed to the issue of whether the State justifiably relied on past federal and Washington cases to continue to act under the existing Washington statute.

Such a memorandum discussing an agency director's opinion of law is, of course, not binding on this court. Even had this opinion been stated in an official agency statutory construction or written in an attorney general opinion, it would not be binding on either the State or this court. *Walthew, Warner, Keefe, Arron, Costello & Thompson v. Department of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984); *Prante v. Kent Sch. Dist. 415*, 27 Wn. App. 375, 385, 618 P.2d 521 (1980). "The court is the proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of an agency charged with carrying out the law, it is ultimately for the courts to declare the law and the effect of the statute." *Nucleonics Alliance Local Union 1-369 v. WPPSS*, 101 Wn.2d 24, 29, 677 P.2d 108 (1984).

Even if the director's opinion was that *Armco* placed in question the constitutionality of the B & O tax, it was not within his power to stop collecting taxes under a statute which had been properly enacted by the Legislature. The Department of Revenue was collecting taxes under a statute that had been repeatedly upheld and also enjoyed the presumption of constitutionality. The party challenging the statute would have to prove its invalidity beyond a reasonable doubt. *High Tide Seafood v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986). The State is not estopped from

arguing for prospective application of *Tyler* because it continued to collect taxes under a statute upheld by the trial court and this court because the *Armco* decision raised questions of constitutionality. A similar argument was discussed by the Supreme Court in *Lemon v. Kurtzman,* 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973). In *Lemon* state officials continued to act under a statute when they knew that it was obvious there would be a constitutional attack on the statute. The Supreme Court held that state officials are entitled to rely on a presumptively valid state statute, enacted in good faith and not plainly unlawful, and that until judges say otherwise, state officers have the power to carry forward the directives of the state legislature. *Lemon,* at 208-09.

The Department of Revenue may well have relied on the decisions of this court upholding the multiple activities exemption against commerce clause challenges, and there was nothing in the Supreme Court's decisions which clearly overruled this court's analysis until *Tyler* was decided last year. In *St. Francis College v. Al-Khazraji,* 481 U.S. , 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987), the Court applied its decision prospectively because it had required a court of appeals to overrule its prior cases. *St. Francis,* 95 L. Ed. 2d at 589. As Justice Traynor has pointed out, "[r]eliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,* 28 Hastings L.J. 533, 543 (1977).

B. COMMERCE CLAUSE PURPOSE

Since we conclude that *Tyler* did establish a new principle of law, we must look to see if the purpose of the commerce clause will be furthered or retarded by retroactive application.

51910-2; 51110-1

The central purpose of the commerce clause is to create an area of free trade among states. *American Trucking Ass'ns, Inc. v. Scheiner,* U.S. , 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). However, the Court was clear in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 288, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) that interstate commerce may be made to pay its fair share of tax burdens. "After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce pays for the governmental services it enjoys." *Department of Rev. v. Association of Wash. Stevedoring Cos.,* 435 U.S. 734, 760, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978).

It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler.* Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. The Supreme Court has noted that a state has "a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Department of Rev. v. Association of Wah. Stevedoring Cos., supra,* at 748. If this court afforded retroactive application and ordered full refunds, taxpayers engaged in interstate commerce would pay no portion of their share of the tax burden. The multiple activities exemption is now known to be unconstitutional because it imposes the risk of multiple burdens on interstate commerce, but this is not to say that all taxes imposed on a manufacturer or wholesaler under the B & O tax were unfair or interfered with free trade among states. The very *risk* of multiple burdens is now enough (since *Tyler*) to invalidate the Washington exemption. But, forcing the State to collect no taxes for the entire period of the statute of limitations would be more in the nature of a punitive award for misconstruing the constitutionality of the B & O tax.

Dicta in *Tyler* suggested that the State could continue to tax under the B & O statute if the Legislature expanded the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states. *Tyler,* 55 U.S.L.W. at 4983. The Washington Legislature has now enacted two credits whereby out-of-state manufacturers are afforded credits against Washington's selling tax for manufacturing tax paid to another state, and a credit whereby out-of-state sellers are afforded a credit against Washington's manufacturing tax for selling tax paid to another state. Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. Taxpayers now tell this court that most of the litigants would receive no credits or only very minimal credits under this legislation. This appears to be an admission that the *risk* of multiple burdens possible under the Washington B & O tax was not in fact an actual double burden for most of these litigants. The effect of complete retroactive application with refunds of all taxes paid would be to create a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers.

Therefore, since the purpose of the commerce clause of free trade among the states is not enhanced by retroactive application and the effect of retroactive application would be to relieve some interstate taxpayers of their duty to pay their fair share of the tax burden, we must ask whether retroactivity would be inequitable.

C. INEQUITY IMPOSED BY RETROACTIVE APPLICATION

Taxpayers argue that denying refunds to litigants would discourage challenges to existing precedent. The taxpayers argue *Tyler* should be applied to them because they bore the burden of litigating the issue. They are essentially arguing for what is termed "quasi-prospective" application wherein the new rule applies

retroactively to the parties to the overruling decision. *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions,* 1985 U. Ill. L. Rev. 117. If courts give successful litigants the benefit of the new rule, they have greater incentive to challenge existing rules. However, this singles out the successful litigant for special treatment while applying the old law to other people similarly situated. It also punishes other parties who relied on prior law and then lose in the overruling decision. 1985-U. Ill. L. Rev. at 128. In addition, in tax cases taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability.

Taxpayer Tyler Pipe argues that, because the State argued against an injunction for the collection of taxes pending resolution of the constitutionality of the B & O tax, it now has an absolute right to a refund under the Washington refund statutes. This court denied the requested injunction not only because a remedy at law existed but also because Tyler Pipe failed to make the requisite showing of a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. Department of Rev.,* 96 Wn.2d 785, 794, 638 P.2d 1213 (1982). The fact that the State argued that taxpayers had an adequate remedy at law in the form of a possible refund should not mean the State is foreclosed from arguing that such a refund is not (under applicable preexisting law) now owed to the taxpayers. Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case. Taxpayers here were on notice that Washington and many other states afford prospective application to decisions finding tax statutes unconstitutional. *Ashland Oil, Inc. v. Rose,* 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed,* 95 L. Ed. 2d 522 (1987); *Metropolitan Life Ins. Co. v. Commissioner of Dep't of Ins.,* 373 N.W.2d 399 (N.D. 1985); *Bond v. Burrows,* 103 Wn.2d 153, 690 P.2d 1168 (1984); *Salorio*

v. Glaser, 93 N.J. 447, 461 A.2d 1100, *cert. denied,* 464 U.S. 993 (1983); *Jacobs v. Lexington-Fayette Urban Cy. Gov't,* 560 S.W.2d 10 (Ky. 1977); *Pellnat v. Buffalo,* 59 A.D.2d 1038, 399 N.Y.S.2d 788 (1977); *Gulesian v. Dade Cy. Sch. Bd.,* 281 So. 2d 325 (Fla. 1973); *Hurd v. Buffalo,* 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973); *Southern Pac. Co. v. Cochise Cy.,* 92 Ariz. 395, 377 P.2d 770 (1963). *But see Perkins v. County of Albemarle,* 214 Va. 416, 200 S.E.2d 566 (1973). Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The *Ashland* court explained that it was irrelevant whether the disputed taxes had been paid or were simply assessed. *Ashland v. Rose, supra.* Both taxes collected and those assessed and unpaid fall within the prospective application of *Armco* and could be retained or collected by the State.

As the previous list of citation illustrates, many states including Washington have found it equitable to afford only prospective application to decisions invalidating taxing statutes. In *Bond v. Burrows, supra,* this court invalidated the statutory scheme establishing a sales tax differential for border counties. After determining the tax statute violated the constitutional rule of proportionality, this court unanimously agreed to give the ruling only prospective application. Implicit in *Bond* is the fact that the court did not apply its decision so as to afford any refunds of past taxes to the counties which had paid higher taxes than the border counties.

Last year in *Ashland v. Rose, supra,* the West Virginia Supreme Court ruled that *Armco* would be applied prospectively. The West Virginia court determined that the reliance of the state on a presumptively valid tax outweighs injuries sustained on account of a holding of prospectivity.

The State's reliance on the constitutionality of the B & O tax was justifiable in light of decisions such as *Tyler Pipe Indus., Inc.*

v. Department of Rev., supra; National Can Corp. v. Department of Rev., 105 Wn.2d 327, 715 P.2d 128 (1986); *Chicago Bridge & Iron Co. v. Department of Rev.,* 98 Wn.2d 814, 659 P.2d 463 (1983); *Department of Rev. v. Association of Wash. Stevedoring Cos.,* 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); and *General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). We do not believe the *Armco* decision so clearly foreshadowed the outcome in *Tyler* that the State's reliance on the validity of the tax was unjustified or that prospective application would be inequitable. As the court in *Salorio* noted, the expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements. *Salorio,* 93 N.J. at 465. Refunds sought in these cases alone exceed $56 million and the State estimates refunds from 1980 through 1984 could be in excess of $423 million. Given that the reliance was justified by the presumptive validity of the tax statute and case law upholding that statute, retroactive application would be inequitable.

We turn now to taxpayers' argument that prospective application would violate due process and equal protection. Prospective application, designed to protect justifiable reliance on prior law and to respect the desire for stability in past transactions, was upheld by the Supreme Court against a due process challenge in 1932 in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). *United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) reiterated the *Sunburst* rule that the federal constitution has no voice upon the subject of retroactivity and that the constitution neither prohibits nor requires retrospective effect be given to any new constitutional rule. (*Griffith v. Kentucky,* 479 U.S. ____, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), made some changes in the *Johnson* rationale in criminal settings, but reaffirmed that

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) is to be used in civil cases.) Implicit in *Bond v. Burrows, supra*, is this court's opinion that retroactive application of a decision invalidating a tax is not constitutionally mandated.

In *Salorio v. Glaser*, supra, the New Jersey Supreme Court gave pure prospective effect to a decision declaring a tax statute unconstitutional and ruled that the plaintiffs were not entitled to reimbursement of taxes paid. That court held that "[t]he modern view is that invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute." *Salorio*, 93 N.J. at 463, 461 A.2d 1100. Both the *Salorio* court and the *Ashland* court rely on *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (*Lemon II*) wherein the Court refused to give retroactive application to its decision declaring a Pennsylvania statute unconstitutional. In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S. Ct. 2105 (1971) (*Lemon* I) the Court held unconstitutional a statute under which the state had reimbursed private sectarian schools for certain educational services. However, in *Lemon* II the Court permitted the state to pay the schools for services provided before its decision. The *Lemon* Court explained, " 'in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.' " *Lemon* II, at 197 (quoting *Chevron Oil Co. v. Huson, supra* at 106). The Court explained that its holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' ". Lemon II, at 198-99 (quoting *Linkletter v. Walker*, 381 U.S. 618, 627, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)). *Lemon* II also recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact

of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon* II, at 199.

The *Ashland* court recognized that

> [a]lthough *Lemon II* is not a tax refund case and does not therefore provide direct and conclusive authority in this case, it provides the basis for applying the retroactivity analysis in the context of protecting state fiscal interests. *See also Cipriano v. Houma,* 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969) (decision holding unconstitutional Louisiana's property-taxpayer limitation on franchise applied prospectively because retroactivity would impose significant hardship on cities, bondholders, etc.)

Ashland, 350 S.E.2d at 536. In *Arizona Governing Comm. v. Norris,* 463 U.S. 1073, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983), the majority of the Supreme Court agreed that retroactive relief was not appropriate upon their finding that a state's pension plan violated Title VII. This court has also recognized that "courts possess the power to give their decisions prospective effect, *i.e.,* not to apply the decision to the parties in the overruling case." *Cascade Sec. Bank v. Butler,* 88 Wn.2d 777, 785, 567 P.2d 631 (1977).

Taxpayers argue that denial of refunds violates equal protection in creating two classes of taxpayers—those whose refund claim is based on the discrimination of the B & O tax against interstate commerce and all others. However, they cite no relevant authority. The body of state and federal law previously cited in the tax area indicates this argument to be without merit. This court held that equal protection forbids all invidious discrimination but does not require identical treatment for all without recognition of difference in relevant circumstances. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n,* 83 Wn.2d

523, 520 P.2d 162 (1974). In a recent tax case the Supreme Court stated: "In the equal protection context . . . if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985). Earlier this year this court held that equal protection challenges to state tax laws are (absent fundamental rights or suspect classifications) reviewed with a minimum level of scrutiny. *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 733 P.2d 539 (1987). A holding of pure prospectivity would divide taxpayers into two classes in regard to the time of the *Tyler* decision. Given the State's reliance on prior law, this is not a classification without a rational basis.

Having weighed the equities in this case, we conclude that pure prospective application from the date of the United States Supreme Court *Tyler* decision is appropriate, and appellants' claims for refunds before June 23, 1987 are denied.

/s/ _____

WE CONCUR:

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TYLER PIPE INDUSTRIES, INC., A DELAWARE CORPORATION,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent,

MANDATE
No. 51110-1
Thurston County
No. 812007314

The State of Washington to: The Superior Court of the State of Washington
in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 28, 1988, became the decision terminating review of this court in the above entitled case on February 17, 1988. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 18th day of February, A.D. 1988.

REGINALD N. SHRIVER

Clerk of the Supreme Court, State of Washington

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TYLER PIPE INDUSTRIES, INC., A DELAWARE CORPORATION, Appellant,	
v.	No. 5110-1
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	

NOTICE OF APPEAL

Notice is hereby given that Tyler Pipe Industries, Inc., appellant, hereby appeals to the Supreme Court of the United States from the opinion and judgment entered in this action on the 28th day of January, 1988. This appeal is prosecuted pursuant to 28 U.S.C. Section 1257(2).

RIDDELL, WILLIAMS, BULLITT & WALKINSHAW

By:_____

THOMAS C. MCKINNON
Suite 4400
1001 Fourth Avenue Plaza
Seattle, Washington 98154

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TYLER PIPE INDUSTRIES, INC., A DELAWARE CORPORATION, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF REVENUE, Respondent.	NO. 5110-1

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Notice of Appeal was made this 9th day of March, 1988, upon all parties required to be served by depositing a copy thereof in the United States Mail, first class postage prepaid, addressed to:

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APPENDIX E

Constitution of the United States:

Article I, Section 8, Clause 3

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington:

82.04.220 Business and occupation tax imposed

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.440 Persons taxable on multiple activities

Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), (6), or (8) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 or

RCW 82.04.260 subsection (4) shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

82.04.500 Tax part of operating overhead

It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

APPENDIX F

Excerpt from Reply Brief of Appellant, dated February 6, 1987, in *Tyler Pipe Industries, Inc. v. State of Washington Department of Revenue,* U.S. , 107 S.Ct. 2810 (1987):

pages 15–16:

C. The so-called "credit" remedy enacted by Washington is meaningless.

Remand to consider the purported remedy to credit taxpayers for gross receipts taxes paid in other states is meaningless, because, as Amici National Governors' Association, et. al. state (Amici Br. 2, 18), no other State currently imposes a gross receipts tax. Washington ignores the fact that the multiple tax burden borne by out-of-state sellers is often in the form of income and franchise taxes. The purported "remedy" is nothing more than an attempt to subject out-of-state sellers to needless protracted litigation and to deny them their tax refunds.

(2)

Supreme Court, U.S.
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No. 87-1767

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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Appellee, State of Washington, Department of Revenue, moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court on the ground that the questions presented are so unsubstantial as to require no further argument.[1]

JURISDICTION

Tyler Pipe Industries, Inc. (TPI) is not entitled to appeal the Washington Supreme Court's decision in *Na-*

[1]This action is not subject to review by appeal pursuant to 28 U.S.C. § 1257(2). See Jurisdiction, *infra.*, p. 1. If this action is treated as a petition for writ of certiorari, the State respectfully requests that this Court deny the petition.

tional Can Corporation v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) pursuant to 28 U.S.C. § 1257(2).[2] In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. ___, 107 S.Ct. 2810 (1987) this Court invalidated Washington's multiple activities exemption, Wash. Rev. Code § 82.04.440. The fact that *National Can* "deals with the effects" of *Tyler Pipe* does not confer jurisdiction by appeal. J.S. 6. On remand the Washington Supreme Court did not sustain the validity of that statute against challenge under the U.S. Constitution, as required by 28 U.S.C. § 1257(2). Instead, the court ruled that *Tyler Pipe* should not be applied retroactively. Thus, TPI is entitled to seek review only pursuant to a petition for writ of certiorari under 28 U.S.C. § 1257(3). TPI's Jurisdictional Statement should be considered as such a petition pursuant to 28 U.S.C. § 2103.

STATEMENT OF THE CASE

TPI sells plumbing pipe and related products in Washington that are manufactured outside this State. Washington imposed wholesaling business and occupation (B&O) tax on these sales for the period 1976 through September 1980. TPI seeks a refund of this tax.

TPI's Statement of the Case details a chronology of the litigation involving this tax. J.S. 7-9. By emphasizing that at each stage of the proceeding it asserted that the tax "violated the Due Process and Commerce Clauses of the United States Constitution" (J.S. 7 and 8), TPI implies that it spearheaded the particular challenge that caused this Court to invalidate the multiple activities exemption in Washington's gross receipts tax. Actually, TPI's claims were much more limited. TPI's administrative appeal confined its constitutional claim to the assertion that it had insufficient contact or nexus with Washington to support

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[2]National Can Corporation and other consolidated taxpayers also seek review of *National Can* by this Court. See *National Can Corporation, et. al. v. State of Washington Department of Revenue*, U. S. Supreme Court Docket No. 87-1629.

the tax and that the amount of the tax was not fairly related to the benefits provided by the State. Petition for Correction of Assessment dated February 25, 1981 at 3.

When its administrative appeal was denied, TPI filed a declaratory judgment action seeking injunctive relief. TPI again asserted that the tax

> violates the Due Process and Interstate Commerce Clauses of the United States Constitution *since there is not a sufficient nexus* or contact with the State of Washington to constitutionally impose the tax and since the *amount of tax assessed is not fairly related* to the benefits, if any, received by [TPI] from the State of Washington.

Complaint For Declaration of Invalidity of Tax Assessment, Injunction and Other Relief at 3, *Tyler Pipe Industries, Inc. v. State,* Thurston County Cause No. 81-2-00731-4 (emphasis added).

After TPI's request for injunctive relief was denied, it paid the tax and amended its complaint to seek a refund. Again, its constitutional claims were that nexus was insufficient and that the tax was not fairly related to benefits provided by the State. Amended Complaint-For Refund of Taxes and Interest Paid And Other Relief at 4. *Tyler Pipe Industries, Inc. v. State,* Thurston County Cause No. 81-2-00731-4. It was only after this Court's decision in *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984) that TPI concentrated its argument on the claim that the multiple activities exemption was discriminatory.[3]

In *Tyler Pipe,* 107 S.Ct. 2810 (1987) this Court disposed of all of TPI's claims. This Court, addressing the challenge brought by National Can Corporation in the companion appeal, U. S. Supreme Court Docket No. 85-2006, held "Washington's multiple activities exemption invalid because it places a tax burden upon manufacturers in

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[3]TPI briefly mentioned discrimination in its Memorandum of Authorities filed prior to trial, lumping it together with other objections for contesting a state's tax, namely lack of proper apportionment and, again, lack of fair relationship between the tax and services provided by the state. *Armco* prompted TPI to petition the trial court for reconsideration of its adverse decision on August 6, 1984.

Washington engaged in interstate commerce from which local manufacturers selling locally are exempt."[4] 107 S.Ct. at 2823. With regard to the claims TPI made prior to *Armco* this Court said: "We reject appellant [TPI's] nexus and fair apportionment challenges to the State's wholesale tax." 107 S.Ct. at 2823. This Court concluded by stating that: "Our partial invalidation of the State's taxing scheme raises remedial issues that are better addressed by the State Supreme Court on remand." 107 S.Ct. at 2823.

Tyler Pipe was handed down on June 23, 1987. Less than two months later, on August 10, 1987, the Washington legislature met in special session to respond to the decision. This Court indicated that the discrimination could be cured by "[e]ither a repeal of the manufacturing tax or an expansion of the multiple activities exemption" to allow a credit for similar taxes paid to other states. 107 S.Ct. at 2821. Following this Court's lead, the legislature repealed the multiple activities exemption and substituted a new system of credits. Under the new law a Washington manufacturer may take a credit against its Washington manufacturing taxes for selling gross receipts taxes paid to another state, local or foreign jurisdiction. Similarly, an out-of-state manufacturer may take a credit against its Washington selling tax for manufacturing gross receipts taxes paid to another state, local or foreign jurisdiction. Laws 1987, 2nd ex. sess., ch. 3. App. A. These credits eliminate any possibility of a multiple burden as a result of duplicate taxes imposed by another jurisdiction.

TPI's Jurisdictional Statement, however, disagrees with this Court that these credits "presumably cure the discrimination."[5] 107 S.Ct. 2821. TPI terms these credits "illusory" (J.S. 12), because no other states impose gross

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[4]TPI claims this Court invalidated Washington's tax system on *both* Commerce Clause and Due Process Clause grounds. J.S. 8. This is incorrect. *Tylor Pipe* sustained Washington's tax system under the Due Process Clause. 107 S.Ct. 2821-22.

[5]Approximately 80 taxpayers are currently challenging the constitutionality of the newly enacted credits in *American National Can Corporation, et al. v. Department of Revenue, State of Washington, et al.*, Thurston County Clause No. 88-2-00680-3.

receipts taxes to which TPI is subject. J.S. 12 and App. F. This assertion is important in this case because it constitutes an admission that TPI has not incurred an actual multiple tax burden as a result of the invalid multiple activities exemption.

On remand the Washington court ruled that this Court's decision in *Tyler Pipe* should not be applied retroactively. The court denied claims for refund before June 23, 1987, the date of this Court's decision in *Tyler Pipe. National Can*, 109 Wn.2d 878, 895 (1988). J.S. B-18. TPI now seeks review of this decision.

INTRODUCTION AND SUMMARY

1. We begin with an initial perspective of the Questions Presented by TPI. J.S. 2. They amount to little more than a claim that it is unfair to require TPI to pay any taxes to Washington — in the past or in the future. This claim does not raise a substantial federal question. This Court resolved the substantial Commerce Clause question in *Tyler Pipe*, 107 S.Ct. 2810 (1987). The issue of TPI's refund does not have the same significance.

Further, we dispute TPI's premise. Although TPI contends that the decision below subjects it to unconstitutional discrimination, the relief which TPI here seeks would actually amount to an unjustified preference and a windfall. The wholesaling B&O tax for which TPI seeks a refund is imposed on all wholesalers, interstate and local businesses alike, without exception. To be sure, we now know from *Tyler Pipe* that the Washington tax system had a constitutional defect. For the multiple activities exemption, as it existed during the periods in question, did not take into account another state's gross receipts taxes. And this feature of the exemption, the State now recognizes, subjected TPI to an unconstitutional risk of multiple taxation.

Less than two months after *Tyler Pipe* the Washington legislature enacted a system of credits that cured the constitutional defect found by this Court, *supra.*, p. 4. Yet TPI now assails that action as "illusory", stating, quite

accurately, that this legislation puts no money in its pocket, for TPI pays no gross receipts taxes to other states. J.S. 11-12 and App. F.

This, of course, pinpoints exactly why granting TPI a refund would be the granting of an unjustified preference and windfall. Had the legislature cured the defect earlier, prior to 1976, rather than in 1987, TPI would have no legitimate complaint. Yet TPI would have obtained not one dollar of benefit from that legislative action. TPI would have had to pay the same tax that was paid by its strictly local competitors. By asking now to be relieved of that tax, TPI seeks more than it would have obtained in the first place.

Quite simply, then, the remedy should be commensurate with the offense, and the decision below does no more than this. By asking for more, TPI is attempting to inject into Commerce Clause jurisprudence a kind of punitive damages theory. And the punitive damages would be inflicted upon the State for periods during which, under the settled law of this Court there was no constitutional defect at all. *See General Motors Corp. v. State*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 419 U.S. 560 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 659 P.2d 463, appeal dism'd, 464 U.S. 1013 (1983).

2. With this overview we will summarize here and later detail our response to TPI's argument that the decision below is incorrect for essentially two reasons. First, the Washington Supreme Court is said to have erred in its conclusion that *Tyler Pipe* established a new principle of law by overruling clear past precedent on which the State relied. J.S. 14-17. Reliance is the first factor set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) that a court must evaluate in deciding whether to apply a decision only prospectively. Second, and apparently without regard to whether the *Chevron* factors were correctly applied, TPI contends that giving only prospective application to this Court's decision in *Tyler Pipe* would do unprecedented

violence to the Commerce Clause.[6] J.S. 11-13. In this regard, TPI argues that the interests protected by the Commerce Clause mandate that no decision invalidating some feature of a state's taxing system can ever be given only prospective application, for it would destroy the incentive to bring Commerce Clause challenges.

3. However, the Court below correctly adhered to the three *Chevron* factors. The tests themselves and their proper application accommodate the Commerce Clause interest of discouraging future discrimination against interstate business. The Commerce Clause does not peculiarly require litigants always be given retrospective relief when the *Chevron* tests for giving a decision only prospective application are otherwise satisfied.

With regard to the first *Chevron* factor TPI argues that to be applied only prospectively a decision must "establish a new principle of law that was not foreshadowed by earlier opinions" and that "*Tyler Pipe* creates no new principle of law." J.S. 14 and 16. This is not the test incorporated in the first *Chevron* factor. In *Chevron* this Court held that a new principle of law is established by "overruling clear past precedent on which litigants may have relied * * * *" 404 U.S. at 106. TPI simply ignores or overlooks this test. The Washington Supreme Court concluded that there was a new principle of law because of "the long line of cases upholding Washington B&O tax, [and] the fact that Tyler [Pipe] overruled past precedent on which the states may have relied * * * *" 109 Wn.2d at 882.

The Washington Supreme Court was equally careful in evaluating the second and third *Chevron* factors — purpose and inequity. The free trade purpose of the Commerce Clause would not be retarded by only prospective application of *Tyler Pipe* because whatever chill was imposed on interstate trade is in the past. Indeed, TPI contents that few other jurisdictions have similar taxes and that it was not subject to an actual multiple burden. Thus,

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[6]TPI first discusses the incentive to litigate and then the *Chevron* question. We reverse that order.

precisely because the discrimination and multiple burdens are more hypothetical than real, it is difficult to imagine that TPI's trade among the states was ever actually chilled in this case.

It would also be inequitable to require the State to make refunds given its reasonable reliance on past precedent. This case involves substantial sums. The State estimates that refunds for the period 1980 through 1984 would be in excess of $423 million. Again, this harm must be weighed against the fact that any refund to TPI would constitute an unjustified preference and a windfall.

4. TPI is also incorrect that only prospective application of *Tyler Pipe* will discourage litigation. This fear is unfounded. To obtain only prospective application of a decision, the three *Chevron* factors must be satisfied. Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Despite this possibility there has been no appreciable drop in litigation at either the state or federal level.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CORRECT

I. THE DECISIONS OF THIS COURT SUPPORT ONLY PROSPECTIVE APPLICATION OF A DECISION, EVEN AS APPLIED TO THE LITIGANTS.

In *Chevron*, 404 U.S. 97, 106-7 (1971) this Court set out three factors for determining whether the decision in a civil proceeding should be applied prospectively or retroactively. These three factors may be referred to as reliance, purpose and inequity. In *National Can*, 109 Wn.2d 878 (1988) the Washington Supreme Court carefully evaluated each factor in deciding not to apply *Tyler Pipe*, 107 S.Ct. 2810 (1987) retroactively.

TPI argues that *National Can* is incorrect and asserts that it is unaware of any decisions of this Court in which a decision has been applied only prospectively to deny monetary relief to the litigant.[7] J.S. 11. Two such decisions of this Court come immediately to mind: *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983).

Sunburst involved an action by a shipper to obtain a refund of freight overcharges. The Montana Supreme Court agreed with the shipper that there had been an overcharge and, in doing so, overruled one of its prior decisions. However, the Montana court applied its new rule only prospectively, thus denying the shipper its refund. In *Sunburst* this Court affirmed the decision of the Supreme Court of Montana and refused to find a denial of due process. 287 U.S. at 363-4.

In *Norris* this Court ruled that Title VII of the Civil Rights Act of 1964 prohibits an employer from offering an annuity plan which uses sex based tables for calculating benefits. However, again, this Court ruled that the decision only applies to benefits derived from contributions collected after the effective date of *Norris*. 463 U.S. at 1111 (O'Connor, J., concurring).

Clearly TPI is incorrect in its assertion that it is unprecedented for this Court to apply its decisions only prospectively to the litigants before it.[8] The decision below is

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[7]At several points TPI emphasizes that it is a "nonresident, nonvoting taxpayer." J.S. 13 and 18. TPI implies that *National Can* applies only to nonresidents. This is incorrect. The court below also refused to apply *Tyler Pipe* retroactively for the benefit of Washington manufacturers, e.g., National Can Corporation and Kalama Chemical Corp.

[8]There is nothing in the opinion of this Court in *Griffith v. Kentucky*, 479 U.S. ____, 107 S.Ct. 708 (1987) to suggest that these earlier cases should be re-examined. In *Griffith*, a criminal proceeding, this Court ruled that if a decision is applied retroactively to the litigants it must then be applied retroactively to all cases pending on direct review. This case is a civil proceeding and quite different, for *National Can* refused to apply *Tyler Pipe* retroactively to the litigants themselves.

also correct and this case does not present important questions of law that must be resolved by this Court.[9] We will demonstrate this point by reviewing, in turn, each of the three *Chevron* factors and the manner in which they were applied below.

II. THE RELIANCE FACTOR — TYLER PIPE ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING PAST PRECEDENT ON WHICH THE STATE HAD JUSTIFIABLY RELIED.

In *National Can*, 109 Wn.2d at 882-88 (J.S. B-4 — B-10) the Washington Supreme Court concluded that *Tyler Pipe*, 107 S.Ct. 2810 (1987) had established a new principle of law because this Court had overruled past precedent. The court below placed primary reliance on "the long line of cases upholding the Washington B&O tax, [and] the fact that *Tyler* [*Pipe*] overruled past precedented on which the states may have relied * * * *" 109 Wn.2d at 882. J.S. B-4.

TPI argues that *National Can* is incorrect because "*Tyler Pipe* creates no new principle of law." J.S. 16. Significantly, TPI does not disagree that past precedent has been overruled. TPI simply ignores the significance of the overruling of past precedent as the Court establishes a new

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Thus, the chance beneficiary problem that troubled this Court in *Griffith*, 107 S.Ct. at 713, in the criminal context, is not present in this civil proceeding. This case falls squarely within "the appropriate scope of federal equitable remedies, a problem arising from the enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). In this case the equities, balanced as required in *Chevron*, compel the conclusion that *Tyler Pipe* should be applied only prospectively.

[9]If TPI's Jurisdictional Statement is regarded — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, the writ should not issue. This case fails to meet the considerations outlined in Rule 17.1 of the Rules of the Supreme Court. TPI alleges no conflict between the decision below and the decision of any other state or federal court or any decision of this Court. In addition, the Washington Supreme Court did not decide an important question of law which has not been, but should be, settled by this Court.

principle of law. J.S. 14. TPI's analysis of *Tyler Pipe* is fundamentally flawed because TPI ignores the substantial part of this Court's analysis. J.S. 14-16.

A. A New Principle of Law is Established When This Court Overrules Past Precedent.

The first *Chevron* factor is reliance. To be applied prospectively only a decision

> must *establish a new principle of law, either by [first] overruling clear past precedent on which litigants may have relied,* * * * or by [second] deciding an issue of first impression whose resolution was not clearly foreshadowed * * * *

Chevron, 404 U.S. at 106 (citations omitted, emphasis added).

TPI paraphrases the first *Chevron* factor inaccurately. According to TPI the decision to be applied only prospectively must "establish a new principle of law that was not clearly foreshadowed by earlier opinions." J.S. 14. TPI's paraphrase ignores the clear statement in *Chevron* that there are two alternative ways to establish a new principle of law. The first is "by overruling clear past precedent on which litigants may have relied." 404 U.S. at 106. TPI skips over the first alternative and focuses exclusively on the second: a new principle may be established "by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106.

Thus, TPI's argument is based on an inaccurate statement of the first *Chevron* factor. *Chevron* stands for the proposition that a new principle of law is established when this Court unmistakably overrules clear past precedent. The precedent overruled may be precedent of this Court or of other appellate courts. *Chevron*, 404 U.S. at 107 and *Saint Francis College v. Al-Khazraji*, 481 U.S. ___, 107 S.Ct. 2022, 2025-26 (1987).

B. Tyler Pipe — Not Armco — Overruled Past Precedent In Holding The Multiple Activities Exemption Invalid Because Of The Risk Of Multiple Burden.

The Washington Supreme Court is correct — *Tyler Pipe* is the case that overruled past precedent. To establish this point we will briefly review *Tyler Pipe*.

This Court's discussion of the discrimination issue in *Tyler Pipe*, is contained in Part III of the opinion. 107 S.Ct. 2816-20. This Court was primarily concerned with the discrimination claim of Washington manufacturers. 107 S.Ct. 2813 and 2816. However, this Court's analysis also disposed of the discrimination claim made by out-of-state manufacturers such as TPI. 107 S.Ct. at 2821. There are two parts to this Court's analysis.

First, this Court considered the structure and consequences of the multiple activities exemption. 107 S.Ct. 2816-7. This Court relied on *Armco*, 467 U.S. 638 (1984) to establish that the manufacturing B&O tax was facially discriminatory. Second, this Court considered the State's argument that the manufacturing tax was valid as a compensating tax, despite the apparent facial discrimination. 107 S.Ct. at 2817-20. This Court concluded that the manufacturing B&O tax was not valid as a compensating tax because the multiple activities exemption held the potential for a discriminatory multiple burden. This Court's holding with regard to compensating taxes overruled past precedent. We begin with a discussion of that past precedent.

1. Prior to Tyler Pipe Washington's tax was repeatedly sustained; and compensating taxes were sustained despite the risk of multiple burdens.

Two aspects of the law prior to *Tyler Pipe* are important in this case. First, prior to *Tyler Pipe* Washington's B&O tax was repeatedly sustained against constitutional challenge. The B&O tax at issue in *Tyler Pipe*, including the multiple activities exemption, had remained essentially unchanged since 1950. As this Court noted in *Tyler Pipe*, 107 S.Ct. 2015 n.9, the constitutionality of this system had been challenged on several occasions and had always been sustained; sustained by the Washington

Supreme Court and Court of Appeals and sustained by this Court. See *B. F. Goodrich v. State*, 38 Wn.2d 663, 668, 231 P.2d 325 (1951), cert. denied, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 759, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962), aff'd 377 U.S. 436, 449 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington*, 10 Wn.App. 45, 52, 516 P.2d 1043 (1973), aff'd 419 U.S. 560, 563 (1975); and *Chicago Bridge & Iron Co. v. Washington Department of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983), appeal dismissed for want of a substantial federal question, 464 U.S. 1013 (1983). Thus, until this Court's decision in *Tyler Pipe* Washington's B&O tax was imposed with the full approval of the courts.

Second, prior to *Tyler Pipe* this Court sustained compensating taxes — such as the use tax — despite the possibility of a multiple burden. This Court has long been aware that a compensating tax may result in a multiple burden. The possibility of a multiple burden exists whenever one state imposes a use tax on goods without allowing a credit for sales taxes paid, on the same goods, to another state. Without the credit the same goods are potentially subject to both a sales tax and a use tax. In such a case the risk of a multiple burden is obvious.

Despite this possibility, this Court refused to invalidate a use tax, on the grounds of a potential multiple burden, until "a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); and *Williams v. Vermont*, 472 U.S. 14, 21-2 (1985). This Court applied the same rule in sustaining the Washington B&O tax in *General Motors*, 377 U.S. at 448-49 and *Standard Pressed Steel*, 419 U.S. at 563. Until *Tyler Pipe* this Court had consistently required taxpayers subject to compensating taxes to prove they were subject to an actual multiple burden; until *Tyler Pipe* the mere risk of such burden had not been enough.

2. Tyler Pipe overruled past precedent by holding the multiple activities exemption discriminatory, without proof of an actual multiple burden.

The manufacturing B&O tax appears discriminatory because it is imposed primarily on interstate commerce. However, a tax that appears discriminatory does not discriminate against interstate commerce, if it is a valid compensating tax. The use taxes sustained in *Silas Mason* and *Southern Pacific* also appeared facially discriminatory because they were imposed solely on goods from out of state.

In *Tyler Pipe* this Court ruled that the manufacturing tax was not valid as a compensating tax because the benefits of the multiple activities exemption did not extend to another state's taxes. This Court said that the multiple activities exemption eliminates "the risk of multiple taxation when the acts of manufacturing and wholesaling are both carried on within the State. The exemption excludes similarly situated manufacturers and wholesalers which conduct one of those activities within Washington and the other activity outside the State." 107 S.Ct. at 2820. To have a valid multiple activities exemption this Court said it would be necessary for the State to provide "a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 107 S.Ct. at 2819-20.

Thus, this Court ruled that the manufacturing tax was not valid as a compensating tax, because of the risk of multiple burden caused by the failure of the multiple activities exemption to take into account the taxes of other states. This Court also applied this analysis to the claims of out-of-state manufacturers. 107 S.Ct. at 2821. *Tyler Pipe* rests entirely on the *risk* of multiple burden. TPI never proved or even claimed it was actually subject to a gross receipts tax on manufacturing or selling imposed by another state. Indeed, TPI now claims that it does not pay such taxes because few other jurisdictions impose them. J.S. 12 and App. F.

Tyler Pipe, then, overruled past precedent in two respects. First, of course, it overruled prior decisions in Washington and of this Court sustaining the very tax system at issue in *Tyler Pipe*. See Section II(B)(1), *supra.*, p. 13. The majority specifically overruled *General Motors* to the extent it was inconsistent. 107 S.Ct. at 2820. Second, *Tyler Pipe* overruled this Court's prior decisions sustaining compensating taxes, despite the risk of multiple burden caused by the failure to allow a credit for taxes paid to another state. 107 S.Ct. at 2824 (Scalia, J., dissenting). See Section II(B)(1), *supra.*, p. 13.

3. In Tyler Pipe this Court invoked Armco merely as a prelude to its discussion of the compensating tax issue.

TPI argues that because of this Court's reliance on *Armco*, *Tyler Pipe* cannot be viewed as overruling past precedent. J.S. 14-16. In fact, this Court invoked *Armco* only to set the stage for its discussion of the compensating tax issue. This Court began by noting that the multiple activities exemption "has the same facially discriminatory consequences as the West Virginia exemption * * * invalidated in *Armco*." 107 S.Ct. at 2816. This Court went on to say that its reliance in *Armco* on Justice Goldberg's dissent in *General Motors*, 377 U.S. 459-60 dooms the State's effort to distinguish "between an exemption from a wholesaling tax — as was present in *Armco* — and the exemption from a manufacturing tax" in *Tyler Pipe*. 107 S.Ct. at 2817. Thus, the taxes in both Washington and West Virginia appeared facially discriminatory. Washington's manufacturing tax would therefore be invalid *unless* it was a valid compensating tax.

As we have shown, *Armco* is not the case which accomplished the critical overruling. For only after *Tyler Pipe* do we know that a compensating tax, to be valid, must contain a credit for taxes paid to other states. 107 S.Ct. at 2819. However, after *Armco* no such credit was required. In *Williams v. Vermont*, 472 U.S. 14, 22 (1985), which was decided one term after *Armco*, this Court again

refused to strike down a use tax owing to the risk of multiple burden caused by the failure to allow a credit for sales tax paid to another state.[10] See *Tyler Pipe*, 107 S.Ct. at 2824 (Scalia, J., dissenting).

To be sure, in *Armco* West Virginia argued that its wholesaling tax was valid as a compensating tax. This Court rejected the argument, however, because of difference in the rate and measure of West Virginia's wholesaling and manufacturing taxes. According to this Court, these differences "[make] clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax" on selling. 467 U.S. at 643. In contrast, this Court in *Tyler Pipe* recognized that the rate and measure of Washington selling and manufacturing B&O taxes were the same. 107 S.Ct. at 2813. This Court focused instead on the failure of the multiple activities exemption to encompass another state's gross receipts taxes. In so doing *Tyler Pipe* overruled critical past precedent.

III. THE PURPOSE FACTOR — THE PURPOSE OF THE COMMERCE CLAUSE WILL NOT BE IMPAIRED BY PROSPECTIVE APPLICATION OF TYLER PIPE.

The second factor is purpose. The test is "whether retrospective operation will further or retard" the operation of the new rule. *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 888-90 (J.S. B-10 — B-12) the Washington Supreme Court determined that purely prospective application of *Tyler Pipe*, 107 S.Ct. 2810 (1987) would not retard the Commerce Clause purpose of promoting an area of free trade among the states. The court concluded that "whatever chill was imposed on interstate trade is in the past * * * *" 109 Wn.2d at 888. J.S. B-11. Indeed, it is difficult to imagine that free trade among the states was actually chilled in this case. TPI contends that few other jurisdictions have similar taxes. J.S. 12 and App. F. Thus,

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[10]In *Williams* this Court did subsequently invalidate the use tax because it violated the Equal Protection Clause. 472 U.S. at 27.

the risk of multiple burden present in the multiple activities exemption "was not in fact an actual double burden for most of these litigants." 109 Wn.2d at 889. J.S. B-12.

Retroactive application of *Tyler Pipe* would actually frustrate the Commerce Clause policy that interstate commerce should pay its fair share of the cost of state government by creating "a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers." 109 Wn.2d at 890. J.S. B-12. The court thus recognized that the refunds demanded by TPI would constitute a windfall. For if the multiple activities exemption had encompassed another state's taxes in the first place, TPI would have been entitled to no refunds whatsoever.

TPI does not dispute the court's evaluation of the purpose of the Commerce Clause in its analysis of the purpose factor. Instead, TPI contends that giving *Tyler Pipe* only prospective application — even if all three *Chevron* factors are met — will discourage litigation and thus encourage future discrimination. J.S. 11-13. This fear is unfounded.[11] Application of judicial decisions on a purely prospective basis has been a possibility recognized by this Court since at least 1932 when this Court approved the practice in *Sunburst*, 287 U.S. 358 (1932). Despite this possibility, there has been no appreciable drop in litigation at either the state or federal level. As the court observed in *National Can*, "taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability." 109 Wn.2d at 890. J.S. B-13.

TPI argues that the Washington Supreme Court's response is "spurious" because it will receive no future benefit from the two-way credit enacted by the Washington legislature in response to *Tyler Pipe*. J.S. 11-12. This is so,

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[11]A number of commentators concur that the fear of drying up litigation is overblown. Auerbach, Garrison, Hurst & Mermin, *The Legal Process*, 176-77 (1961); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 546-47 (1977); and Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1613-14 (1975).

says TPI, because it is not subject to a selling or manufacturing tax imposed by another state.[12]

TPI's argument ignores this Court's rationale in *Tyler Pipe*. This Court invalidated the multiple activities exemption because of the risk of multiple burden. Washington eliminated this risk by adopting this Court's suggestion of allowing credits against Washington taxes for manufacturing and selling taxes paid to other states. TPI received no benefit because it suffered no harm.

TPI appears to argue that the credit is illusory because it does not extend to other kinds of taxes such as income or franchise taxes. J.S. App. F. These other kinds of taxes do not result in a multiple burden. A taxpayer subject to a use tax must, after *Tyler Pipe*, receive a credit for sales taxes paid to another state on the same goods. This Court has never suggested that such credit must extend to other taxes such as income or franchise taxes.

The legislative credit eliminates the risk of multiple burden. If any other state adopted Washington's tax system, as it has the right to do, there would be no impermissible interference with free trade.[13] Thus, the risk of

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[12]TPI's assertion of its right to a full refund of taxes (J.S. 19-20) fails to acknowledge the existence of alternative remedies that would remain for consideration, even if a court were to reject the option of giving only prospective application to this Court's decision in *Tyler Pipe*. Under Washington's 1987 credit law, *supra.*, p. 4, credits would be granted retroactively were this Court to determine that relief should be appropriate for tax reporting periods prior to August 11, 1987. Also, as recognized by this Court in *Tyler Pipe*, 107 S.Ct. at 2822-23, a deficiency in the credit remedy might, as a matter of state law, warrant severance of this offending multiple activities exemption as it existed prior to the 1987 amendment. Finally, this Court recognized that a repeal of the manufacturing tax, effected judicially or legislatively, and providing refunds to in-state manufacturers, "would presumably cure the discrimination." 107 S.Ct. at 2821. The thrust of TPI's position is to reject the alternative remedies which all eliminate the risk of multiple tax burden. Its demand for a full refund of tax, as the only acceptable remedy, is the least justified alternative for a taxpayer in its situation.

[13]For example, in the oral argument in *Tyler Pipe*, its counsel indicated that Texas did not have a gross receipts tax but "one has been proposed for * * * enactment." Official Transcript Proceedings Before The Supreme Court of the United States at 18, *Tyler Pipe*. If Texas

multiple burden has been eliminated, and there is no disincentive for TPI to do business in Washington and another state with a manufacturing or selling gross receipts tax.

IV. THE INEQUITY FACTOR — IT WOULD BE INEQUITABLE TO APPLY TYLER PIPE RETROACTIVELY AND REQUIRE REFUNDS IN THIS CASE.

The third factor is inequity. The test is whether retroactive application of the Court's decision will "produce substantial inequitable results." *Chevron*, 404 U.S. at 107. In *National Can*, 109 Wn.2d at 890-92 (J.S. B-12 — B-15) the Washington Supreme Court concluded that retroactive application of *Tyler Pipe*, 107 S.Ct. 2810 (1987) would be inequitable because "the State estimates refunds from 1980 through 1984 could be in excess of $423 million." 109 Wn.2d at 892. J.S. B-15. Against this harm must be weighed the fact that TPI suffered no actual harm from the now invalid multiple activities exemption. This Court invalidated the exemption because it created a risk of multiple burden for taxpayers potentially subject to taxes of other states by failing to encompass such other taxes. TPI paid no such taxes. J.S. 12 and App. F.

The court also emphasized that the State's "reliance was justified by the presumptive validity of the tax statute and the case law upholding that statute." 109 Wn.2d at 892. J.S. B-15. TPI charges that Washington "has a history of aggressive taxation." J.S. 12-13. The only thing aggressive about the State's conduct is that it has collected B&O taxes since 1950, the validity of which had been continually sustained by both the Washington Supreme Court and this Court until *Tyler Pipe*. See Section II(B)(1), *supra.*, p. 13.

TPI argues that it should receive a refund because the Washington Supreme Court earlier denied its request for an injunction in *Tyler Pipe Industries, Inc. v. Department*

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adopts a gross receipts tax, as it has a right to do, TPI will benefit from the Washington credit.

of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982) (*Tyler I*). J.S. 18. TPI sought this injunction on the ground that there was insufficient nexus to support the imposition of the tax. 96 Wn.2d at 793. See, *supra.*, p. 3. The Washington Supreme Court denied the injunction because TPI "has not made the requisite showing of a likelihood of success on the merits." 96 Wn.2d at 794. The Washington Supreme Court was correct. TPI did not prevail on its nexus claim before this Court in *Tyler Pipe*.[14]

TPI did not raise the question of multiple burden in the injunction proceeding. It was not until after *Armco*, 467 U.S. 638 (1984) that TPI focused on the discrimination issue, long after the injunction had been denied. Given its reliance on the nexus issue and its subsequent emphasis on the claim of discrimination after the fact of *Armco*, TPI's situation warrants no greater consideration for refund relief than the claims of other out-of-state manufacturers who, like TPI, have established no actual multiple tax burden for the years in issue.

CONCLUSION

For the reasons given above, this appeal should be dismissed or, in the alternative, the judgment should be affirmed.[15]

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[14]TPI makes a related argument that it was deprived of its property without the opportunity for a hearing. J.S. 20. In fact, TPI had a full hearing prior to paying the tax. The Washington Supreme Court ruled against TPI in that hearing and denied injunctive relief because there was sufficient nexus to impose the tax. *Tyler I*. This Court affirmed that conclusion in *Tyler Pipe*.

[15]If TPI's Jurisdictional Statement is considered — as it should be — as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, TPI's petition should be denied.

DATED this 13th day of May, 1988.

Respectfully submitted,

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APPENDIX A

Wash. Rev. Code § 82.04.440, As Amended By Laws 1987, 2nd ex. sess., ch. 3.

(1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.250 or 82.04.260 subsection (4) shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the

credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states. [1987 2nd ex.s. c 3 § 2]

The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of

this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage. [1987 2nd ex.s. c 3 § 1]

If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before August 11, 1987, in respect to RCW 82.04.440 as it existed before August 11, 1987, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits. [1987 2nd ex.s. c 3 § 3]

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1987 2nd ex.s. c 3 § 4]

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No. 87-1767

In The Supreme Court of the United States

OCTOBER TERM, 1987

TYLER PIPE INDUSTRIES, INC.

Appellant

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

Appellee

On Appeal from the Supreme Court of Washington

REPLY TO MOTION TO DISMISS OR AFFIRM

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I.

TO SHORE UP THE ILLUSORY ARGUMENTS OF THE WASHINGTON SUPREME COURT, THE STATE OF WASHINGTON DISTORTS THIS COURT'S RULINGS, THEREBY EMPHASIZING THE UNSUPPORTED AND UNPRECEDENTED DENIAL BY THE WASHINGTON SUPREME COURT OF ANY REMEDY TO A SUCCESSFUL LITIGANT

The State of Washington relies on *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to support its assertion that decisions of this Court have been applied "only prospectively to deny monetary relief to the litigant."[1] The State's characterization of the holdings in these cases is astounding. The cases do

[1]Appellee's Motion to Dismiss or Affirm ("Motion") at 9.

not stand for the State's proposition at all. In each case cited, prospectivity was either not applied or applied to preserve the individual's right to a remedy, and in fact each litigant's right to a remedy was preserved.

The District Court in *Norris* ordered a state agency to assure that future annuity payments to retired females would equal payments to similarly situated males.[2] The *Norris* case does not support the State's argument because:

1. This Court noted that when a court directs changes in benefits based on contributions made prior to its order "the Court [has] awarded relief that is fundamentally retroactive in nature."[3] It was abundantly clear to the dissent that retroactive relief had been granted.[4]

2. The *Norris* claimants were given a remedy: women were entitled to receive the same benefits as men.

In *Sunburst,* the Supreme Court declined to find any constitutional issues because no federally protected right was abrogated in the State of Montana's resolution of what type of common law it wanted to establish for its own purposes with respect to prospective application of rates.[5] The *Sunburst* case does not support the State's argument because:

1. The case did not involve the federal prospectivity question. The *Sunburst* case did not purport to give Montana the power to determine how the federal rule would apply in a given case. *Sunburst* preceded *Chevron* by almost forty years. The *Chevron* case lays down the applicable guidelines for determining applicability of the federal rule.

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[2]*Norris,* 463 U.S. at 1092.

[3]Id. at 1093. *Norris* was a class action. By its very nature, retroactive application of a class action is more likely to have inequitable results than is retrospective application of a single litigant's case, such as Tyler's, and therefore may justify non-retroactive treatment, yet notwithstanding this fact, the Court still gave effective retroactive treatment to the order.

[4]Id. at 1112.

[5]*Sunburst,* 287 U.S. at 361.

2. The *Sunburst* claimant was given a remedy: it recovered its excess rate payments.

One of the *Chevron* court's principal concerns with retroactive application was that "retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever . . . [T]o abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress."[6] The *Chevron* case does not support the State's argument because:

1. The Court further held that decisions have been applied prospectively to protect property interests and to protect previous elections, and that "the respondent's potential redress for his allegedly serious injury . . . is entitled to similar protection." Although *Chevron* applied part of a Supreme Court decision prospectively, the rationale of the Court in protecting the remedy of the allegedly injured party supports Tyler's, not Washington Supreme Court's, argument here. The *Chevron* court did not apply "pure prospectivity" to the landmark decision and specifically noted that its holding only limited denial of retroactive effect to the statute of limitations as applicable under the prior case.[7]

2. The *Chevron* claimant's right to a remedy was preserved.

Though the State of Washington repeatedly urges that the Washington Supreme Court "carefully evaluated" the *Chevron* factors[8], and repeatedly cites that court's opinion in support of the alleged careful evaluation, the issue is not whether the Washington Court "carefully evaluated" the *Chevron* factors, but whether it correctly applied them in this case, which it did not. The circuit courts have split in their interpretation of the *Chevron* test. Some have applied the "reliance factor" as a threshold test for prospectivity, while others have required balancing of all three

[6]*Chevron*, 404 U.S. at 109.

[7]Id.

[8]Motion at 8.

factors. Recently, some courts have required that all three *Chevron* factors independently favor prospectivity before it can be applied.[9] Such disparate treatment of civil litigants alone suggests that this Court resolve the prospectivity issue.

The Constitution limits a government's ability to intrude upon an individual's rights. These decisions of this Court interpreting the Constitution, *supra,* consistently protect the individual's rights from government intrusion. By objecting to review of this case, the Washington Supreme Court would have this Court permit it to protect state government from taxpayers seeking to enforce their constitutional rights. Neither the Constitution, *Chevron, Norris,* nor *Sunburst* sanction that, and the State has failed to attach its position to those authorities.

II.

RESPONDENT NEVER ADDRESSES TYLER'S PRINCIPAL CONTENTION: DENIAL OF A REMEDY IS DENIAL OF DUE PROCESS.

The Washington Supreme Court has denied Tyler a remedy.

Tyler contends that denial of a remedy is denial of due process, for there is no value to a court procedure without a remedy. The Washington Supreme Court says that a taxpayer has an incentive to litigate "to avoid future tax liability." This belies common sense. What taxpayer, when advised by counsel that a tax is un-

[9] *Cash v. Califano,* 621 F.2d 626 (4th Cir. 1980); *Occhino v. United States,* 686 F.2d 1302 (8th Cir. 1982); *Jordan v. Weaver,* 472 F.2d 985 (7th Cir. 1973); *Cochran v. Birkel,* 651 F.2d 1219 (6th Cir. 1981) *cert. denied,* 454 U.S. 1152 (1982); Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause,* 41 Tax Lawyer 103, 138-141 (1987).

constitutional, but there is no remedy, will proceed? The State's only response to the Washington Court's removal of any incentive for taxpayers to challenge unconstitutional taxes is the tangential observation that there has been no appreciable drop in litigation since the Court's decision in *Sunburst.*[10] An observation of such questionable relevance highlights how the State of Washington will tax this Court's credulity to attempt to justify the abrogation of Tyler's constitutional rights. The State assumes that taxpayers are and should be willing to subject themselves to unconstitutional discriminatory treatment in order perhaps to obtain some kind of future lawful treatment. This Court has not interpreted the commerce clause and the due process clause to require a taxpayer to be willing to make this sacrifice in order to avail itself of rights protected by the Constitution.[11] If the State is permitted to flout the Constitution by violating constitutional rights of taxpayers not once but *twice,* recognizing no limitations on its power to do so, then each state will have every incentive to create its own version of "due process."

This case is ripe for review. If allowed to stand, the Washington Supreme Court's decision will stop, or at least substantially discourage, future litigants from challenging states' unconstitutional actions.

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[10]Motion at 17.

[11]The State's whole argument is somewhat ingenuous in light of the State's enactment of legislation to deny Tyler and other taxpayers any future recovery as well.

CONCLUSION

For the foregoing reasons, the Court should deny the State of Washington's Motion to Dismiss or Affirm and should note probable jurisdiction of this appeal or, in the alternative, grant a writ of certiorari.

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Reply to Motion to Dismiss or Affirm was made this 31st day of May, 1988, upon all parties required to be served by depositing three copies thereof in the United States Mail, first class postage prepaid, addressed:

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